SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 502.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

THE CHASE NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

United States Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), vs. The Chase National Bank, defendant in error (defendant below). Transcript of Record. Error to the United States District Court for the Southern District of New York.

1 WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the District Court of the United States, for the Southern District of New York, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between United States of America, plaintiff, and The Chase National Bank, defendant, a manifest error hath happened, to the great damage of the said United States of America as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly
2 and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 28th day of November, 1917, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 30th day of October, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

J. M. MAYER,
U. S. District Judge.

3 SUMMONS.

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
THE CHASE NATIONAL BANK.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Charles M. Hough, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 3rd day of April, in the year one thousand nine hundred and sixteen.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

[SEAL.] H. SNOWDEN MARSHALL,
United States Attorney, Plaintiff's Attorney.

Office and post-office address, U. S. Court and P. O. Building, borough of Manhattan, New York City.

4 COMPLAINT.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CHASE NATIONAL BANK, DEFENDANT.

The plaintiff above named, by its attorney, H. Snowden Marshall, United States attorney for the Southern District of New York, for its complaint against the defendant, alleges upon information and belief:

First. That at all the times hereinafter mentioned, the plaintiff was and is a corporation sovereign, and the defendant was and is an association organized for and transacting the business of banking in the city, State, and Southern District of New York, under and pursuant to the provisions of the acts of Congress in such case made and provided:

Second. That on or about the 18th day of December, 1914, the defendant presented to the Treasurer of the United States at Washington, D. C., for payment, a draft in the sum of $3,571.47, drawn

on the Treasurer of the United States, payable to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., and purporting to be drawn by E. V. Sumner, Acting Quartermaster, U. S. A., and to be endorsed by E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., the Howard National Bank, and the defendant; a copy of said draft and the indorsements on the back thereof is hereto attached and marked Exhibit A, and made a part hereof;

Third. That at the date of the presentation of said draft by the defendant to the Treasurer of the United States, the defendant was a depository of the funds of the United States of America, and payment of said draft to the defendant was thereupon made by the plaintiff, by passing a credit for the amount of said draft to the defendant upon the accounts of the defendant, as depository of the funds of the plaintiff;

Fourth. That the name of said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., endorsed upon the back of said draft, was forged and had been wrongfully and fraudulently written upon the same by a person other than the said E. V. Sumner, without his knowledge or consent, and no part of the proceeds of said draft were ever received by him;

Fifth. That the payment of said draft made by the plaintiff to the defendant, as described in paragraph three of this complaint, was made under a mistake of fact and without knowledge that the signature of the said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., payee thereof, had been forged upon the back of said draft;

Sixth. That the plaintiff has duly requested the defendant to repay to it the amount of said draft, to wit, $3,571.47, but the defendant has failed and refused to pay the same or any part thereof to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant in the sum of $3,571.47, with interest thereon from the 18th day of December, 1914, together with the costs and disbursements of this action.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office and Post Office Address, U. S. Court and Post Office Bldg., Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Earl B. Barnes, being duly sworn, deposes and says that he is an assistant United States attorney for the Southern District of New York;

That he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as

to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true;

That the reason why this verification is made by deponent and not by plaintiff is because plaintiff is a corporation sovereign;

7 That the sources of deponent's information and the grounds for his belief as to the allegations therein contained are communications from the Treasury Department of the plaintiff and a photographic copy of the draft mentioned in the complaint.

EARL B. BARNES.

Sworn to before me this 3rd day of April, 1916.

[SEAL.] S. H. RICHARDS,
Notary Public, New York County No. 66.

EXHIBIT A.

Face.

War Department
Quartermaster

Office of the Quartermaster,
Fort Ethan Allen, Vermont.

December 15, 1914.

444

Thesaur Amer
(Shield)
Septent Sigil

TREASURER OF THE UNITED STATES 15–51

Pay to the order of E. V. Sumner, 2d Lt., 2d Cav., AQM $3571.47

Dec. 18

Thirty-five hundred seventy one & 47/100 dollars. Object for which drawn:

Vo. No. Cash transfers.

E. V. SUMNER,
Acting Quartermaster, U. S. A. 21739.

8 *Back.*

Form Approved by the Comptroller of the Treasury

January 27, 1913.

This check must be indorsed on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

E. V. SUMNER,
(Sign on this line)
2d Lt., 2d Cav., AQM.

Pay Chase National Bank
New York, or Order,
Restrictive endorsements guaranteed.
Howard Nat'l Bank,
58–3 Burlington, Vt. 58–3,
M. T. Rutter, Cashier.

Received payment from
The Treasurer of the United States
Dec. 16, 1914.
1–74 The Chase National Bank 1–74
Of the City of New York.

9 AMENDED ANSWER.

District Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA, plaintiff,
against
CHASE NATIONAL BANK, defendant.

As and for an amended answer to the complaint herein, the defendant above-named, by Rushmore, Bisbee & Stern, its attorneys:

First. Admits the allegations contained in the clause of said complainant designated "First."

Second. Upon information and belief, denies each and every allegation contained in the clause of said complaint designated "Second," except that it admits and alleges that on the 16th day of December, 1914, a draft or check of the purport and containing signatures as alleged in said clause "Second" of said complaint, was received by it from the Howard National Bank of Burlington, Vermont, for collection for its account; that, at said time, both the Howard National Bank and the plaintiff herein maintained a deposit account with the defendant, and that upon receipt of said draft or check, in accordance with the instructions of the plaintiff herein, the said draft or check was, on said date, paid by charging the amount thereof to the account of the plaintiff herein, whereupon said amount
10 was forthwith credited to the account of the said Howard National Bank; and that notice of said payment was, on said date, duly given to the plaintiff and, at the same time, the said draft or check was delivered to the plaintiff.

Third. Alleges, upon information and belief, that, in due course, after the receipt by the plaintiff of said notice of the payment of

said draft or check, the plaintiff duly credited the amount thereof to the defendant in its account with the defendant; that notice of payment of the draft or check was received by the plaintiff on or about the 17th day of December, 1914.

Fourth. Denies that it has any knowledge or information sufficient to form a belief as to whether or not the name E. V. Sumner, appearing upon the back of said draft or check, was forged, and whether or not the said name was written thereon by a person other than the said E. V. Sumner, without his knowledge or consent; and, as to whether or not any of the proceeds of the said draft or check were ever received by said E. V. Sumner.

Upon information and belief, defendant alleges that the name E. V. Sumner as the drawer of said draft or check, was written by the same person as was the name E. V. Sumner appearing on the back of said draft or check, and that the letters, words, and figures, E. V. Sumner, 2d Lt., 2d Cav., AQM, describing the payee of said draft or check, were intended to describe and represent the same individual whose name purports to be that of the drawer of the said draft or check, and that the words and figures "2d Lt., 2d Cav., AQM"

11 are a contraction for "Second Lieutenant, Second Cavalry, Acting Quartermaster;" that E.V. Sumner, second lieutenant of the Second United States Cavalry, was, on December 15th, 1914, which is the date of said draft, Acting Quartermaster of the United States Army at Fort Ethan Allen, Vermont; that as such Acting Quartermaster the said E. V. Sumner, second lieutenant of the Second Cavalry, was authorized to draw drafts and checks upon the Treasurer of the United States, who, on the 15th day of December, 1914, was the duly appointed and acting disbursing officer of the plaintiff herein.

Except as in this clause Fourth expressly admitted, defendant denies each and every allegation contained in the clauses of said complaint designated "Third" and "Fourth."

Fifth. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the clause of said complaint designated "Fifth."

Sixth. Admits the allegations contained in the clause of said complaint designated "Sixth."

Further answering said complaint, and for a second and separate defense thereto, the defendant alleges as follows:

Seventh. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in the clause of the complaint designated "Fifth."

Eighth. Upon information and belief, that at all the times

12 hereinafter mentioned, the Treasurer of the United States was and is the disbursing officer for the Treasury Department of the United States of America, the plaintiff herein, and therefore, as such was and is the disbursing officer for the plaintiff; and that all drafts and checks drawn by quartermasters or acting quartermasters of the United States Army for funds which such quartermasters or acting quartermasters were entitled to disburse, were drawn by such

officials upon the Treasurer of the United States; that quartermaster and acting quartermasters are comprehended within the term "disbursing officers" of the United States; and that at all times hereinafter mentioned it was the duty of the said treasurer to honor and pay drafts and checks drawn by E. V. Sumner, second lieutenant of the Second Cavalry of the United States Army as Acting Quartermaster.

Ninth. That, on or about the 11th day of February, 1913, the plaintiff herein, acting through its Treasury Department, opened a general deposit account with the defendant; that, in connection with the opening of said account, the plaintiff instructed the defendant to, and the defendant agreed that it would, pay drafts and checks of disbursing officers of the United States drawn upon the Treasurer of the United States when presented in the regular course of business, and charge the same to the plaintiff's deposit account and forward drafts and checks so paid to the United States Treasurer; that such drafts and checks should be so paid by the defendant by charging the same to the deposit account of the plaintiff with the defendant, and that payment so made should result, as between the plaintiff and the defendant, in the same rights and responsibil-
13 ities as when the defendant similarly pay checks or drafts drawn upon another bank by one maintaining a deposit account therein. Shortly after the opening of said deposit account by the plaintiff with the defendant, and on or about the 21st day of February, 1913, it was also agreed between the plaintiff and the defendant that the checks and drafts paid by the defendant would be examined by the plaintiff promptly upon the receipt thereof and that, in the event of the rejection or disputing of any thereof, the plaintiff would notify the defendant not later than the day succeeding that of the receipt of such check or draft; also that the plaintiff would advise the defendant by telegram in case any check or draft for $500 or more should be so rejected or disputed. In connection with the opening of said account, the plaintiff also instructed the defendant to endorse or stamp upon each check or draft paid for its account the following:

"Received payment from The Treasurer of the United States (Date Paid) (Bank No.) Name of Bank (Bank No.) Location."

Tenth. That, on or about the 16th day of December, 1914, the defendant received in the usual course of business from the Howard National Bank of Burlington, Vermont, the draft or check mentioned and set forth in the complaint herein; that the said draft or check was drawn upon a form supplied for the purpose of the plaintiff to E. V. Sumner, second lieutenant, Second Cavalry of the United States Army, Acting Quartermaster, at Fort Ethan Allen, in
14 the State of Vermont; that when said check or draft was received by the defendant the amount thereof had been paid by said Howard National Bank, at Burlington, in the State of Vermont, as defendant is informed and believes, on the 15th day of December,

1914, to the person who presented the same to said bank, which person was a private or petty officer in the United States Army who had previously presented to said Howard National Bank at the same place checks or drafts signed by the said E. V. Sumner, second lieutenant, Second Cavalry of the United States Army, Acting Quartermaster, and had received payment thereof in behalf of the said E. V. Sumner; that, in accordance with defendant's agreement with the plaintiff upon receipt of said check or draft, defendant charged the same to the account of the plaintiff with the defendant, stamped or endorsed the said check or draft as directed by the plaintiff, and, upon the same day, duly forwarded the said check or draft by mail to the treasurer of the plaintiff, together with a statement showing that the said draft had been paid by the defendant by deducting the amount thereof from the credit balance in the account of the plaintiff with the defendant. Upon information and belief, that the plaintiff received the said cheque or draft, together with said notice of payment thereof, on or about the 17th day of December, 1914, and that, in due course, and on the 18th day of December, 1914, the plaintiff duly credited the defendant with the amount of said draft in the plaintiff's books of account.

Eleventh. That the defendant was not advised or notified by the plaintiff of the rejection or disputing of said draft or check in accordance with the agreement between the plaintiff and the defendant as aforesaid, or at all, or that the signature or endorsement of said draft or check was forged, or that the plaintiff claimed that the signature or endorsement of said draft or check was forged, and defendant had no notice thereof until on or about the 2nd day of January, 1915, and that such notice or advice was then received by defendant from the Howard National Bank and not from the plaintiff herein.

Twelfth. Upon information and belief, that the said check or draft purports to be drawn or made by one E. V. Sumner, Acting Quartermaster of the United States Army; that said E. V. Sumner was, on December 15, 1914, Acting Quartermaster of the United States Army at Fort Ethan Allen near Burlington, in the State of Vermont, and that said E. V. Sumner was at said time also second lieutenant of the Second Cavalry of the United States Army.

Thirteenth. Upon information and belief, that the letters "U. S. A." under the name of the drawer of the said draft are a contraction for "United States Army," and that the words and figures "2d Lt., 2d Cav., AQM" following the name of the payee of the said draft, both upon the face and upon the back thereof, are a contraction for "Second Lieutenant, Second Cavalry, Acting Quartermaster."

Further answering said complaint, and for a third and separate defense thereto, the defendant alleges as follows:

Fourteenth. Realleges, repeats and reiterates each and every allegation and denial contained in the clauses of this amended answer designated "Seventh," "Eighth," "Ninth," "Tenth," "Twelfth," and "Thirteenth."

Fifteenth. That the said check or draft purports to be payable to the order of the same person who purports to be the drawer thereof; that the said draft purports to be endorsed by the payee thereof and that the said draft did not become a completed instrument and was not payable until endorsed by such payee. Upon information and belief, defendant alleges that the said draft or check was drawn and signed by the same person who endorsed the same.

Further answering said complaint, and for a fourth and separate defense thereto, the defendant alleges as follows:

Sixteenth. Realleges, repeats and reiterates each and every allegation and denial contained in the clause of this amended answer designated "Seventh," "Eighth," "Ninth," "Tenth," "Twelfth," and "Thirteenth."

Seventeenth. Upon information and belief, that said draft or check was issued and became a completed negotiable instrument in the State of Vermont when the said Howard National Bank paid the said forger the amount thereof at its office in Burlington, in the State of Vermont, on the 15th day of December, 1914, as aforesaid.

17 Eighteenth. Upon information and belief, that ever since the first day of June, 1913, the public acts of the State of Vermont, constituting the statute law of said State, have provided, among other things, by Act No. 99 of the public acts of said State passed by the general assembly of said State at its twenty-second biennial session which commenced October 2, 1912, and ended February 22, 1913, entitled "An act to make uniform the law of negotiable instruments," in Article i of Title 1 of said act, relating to the form and interpretation of negotiable instruments and providing when the same are to be deemed payable to bearer, as follows:

"Sec. 9. When Payable to Bearer. The instrument is payable to bearer:

(1) When it is expressed to be so payable; or

(2) When it is payable to a person named therein or bearer; or

(3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

(4) When the name of the payee does not purport to be the name of any person; or

(5) When the only or last endorsement is an endorsement in blank."

Nineteenth. Upon information and belief, that the said draft or check was payable to bearer within the meaning of the laws of the State of Vermont and also under the law of the State of New

18 York and of the United States, and that the defendant and the said Howard National Bank each became the holder thereof in due course and in good faith for value without notice of any infirmity in the instrument or defect in the title of the person negotiating the same.

Further answering said complaint, and for a fifth and separate defense thereto, the defendant alleges as follows:

Twentieth. Realleges, repeats and reiterates each and every allegation and denial contained in the clauses of this amended answer designated "Seventh," "Eighth," "Ninth," "Tenth," "Twelfth" and "Thirteenth."

Twenty-first. That the defendant was not advised or notified by the plaintiff of the rejection or disputing of the said draft or check, or that the signature or endorsement of said draft or check was forged, or that the plaintiff claimed that the signature or endorsement of said check or draft was forged and that the defendant had no notice thereof until on or about the second day of January, 1915, and that such notice or advice was then received by defendant from the Howard National Bank and not from the plaintiff herein.

Twenty-second. Upon information and belief that the plaintiff was negligent in not promptly making actual discovery of the forgery mentioned in the complaint and in not promptly notifying the defendant of such forgery, and that negligence and failure to
19 give such notice on the part of the plaintiff was greatly to the prejudice of the defendant and prevented the defendant from taking the prompt measures which otherwise it would have taken for the apprehension of such forger and the recovery from him of said monies which he had wrongfully obtained as aforesaid by means of said draft or check, and defendant alleges, upon information and belief, that it would have recovered said monies from the said forger but for the negligence aforesaid of the plaintiff.

Wherefore defendant demands judgment, dismissing the said complaint with costs.

RUSHMORE, BISBEE & STERN,
Attorneys for Defendant.

Office and P. O. Address, 61 Broadway, Borough of Manhattan, City and State of New York.

STATE OF NEW YORK,
County of New York, ss:

William E. Purdy, being duly sworn, says that he is the assistant cashier of the Chase National Bank, the defendant named in the foregoing amended answer; that he has read the said amended answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein contained and stated to be alleged upon information and belief and that as to those matters he believes it to be true.

This verification is not made by the defendant personally because defendant is a corporation.

20 The sources of deponent's information and the grounds of his belief as to all matters contained in said amended answer and not stated of his own knowledge are correspondence and other papers in the possession of the defendant and information obtained by de-

ponent in connection with the performance of his duties as such assistant cashier.

WILLIAM E. PURDY.

Sworn to before me this 26th day of July, 1916.

[SEAL.] CHARLES S. MARTIN,
Notary Public,
New York County No. 72. New York Register No. 8191.

Opinion.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
against
CHASE NATIONAL BANK.

This is an action at law to recover from the defendant, a bank, the amount of a cheque or sight draft drawn under the following circumstances: Lieutenant Sumner was an officer in the United States Army, detailed to the Quartermaster's Department and authorized as such to draw upon funds placed by the Treasury Department at his disposal. One Howard, a sergeant in the Quar-
21 termaster's Department, had been detailed to assist Sumner for some time past, and had learned his method of availing himself of these funds. While Sumner was temporarily away upon leave, Howard took one of the regulation drafts of the Treasury Department, filled it to the order of Sumner and forged Sumner's name as drawer. Having then forged the endorsement of Sumner's name in blank, he cashed the cheque over the counter of the Howard National Bank of Vermont. This bank endorsed the cheque to the defendant, which upon delivery presented it to the Treasurer of the United States, who paid it. Howard's forgery was soon discovered and the plaintiff thereupon sued the defendant to obtain a refund of the amount so paid.

Other circumstances are admitted by the stipulation under which the cause was tried, but they are relevant only upon the question of the negligence of the several parties and as such do not require statement here.

Joseph A. Burdeau, for the plaintiff.

Henry Root Stern, for the defendant.

LEARNED HAND, D. J.: No one disputes since Price vs. Neal, 3 Burr., 1354, that a drawee may not recover money paid upon paper forged by the drawer; on the other hand, no one disputes that if the bill be once lawfully signed and uttered no innocent holder may collect the bill with a forged indorsement and retain the proceeds. The question at bar presents the case where the forger not only forges the putative drawer's name, but makes the bill payable to the drawer and then forges the endorsement as well.

22 A bill made in the form of this cheque, even if valid, is incomplete and not commercial paper at all until it has been endorsed and delivered to some person other than the drawer. Until then it is in form only an order to pay to the maker and no obligation can arise between the maker as maker and himself as payee. This, after some confusion, was decided in the case of notes, Wood vs. Harper, 2 Exch., 13; Brown vs. De Winter, 6 C. B., 336, and is now unquestioned law; Moses vs. Lawrence County Bank, 149 U. S., 298, Negotiable Instruments Law, §320. It is so obvious as not to justify expatiation; and the same reasoning applies to bills.

Therefore, until Howard endorsed Sumner's name the cheque did not even on its face exist as a legal instrument, any more than an undelivered deed; its factum was in abeyance. When he did endorse it in blank and deliver it to the Vermont bank it was an order to pay the sum to bearer. The drawer's name was forged, but the two added forgeries of the same name were of no more significance than if the forger had signed Sumner's name three times as drawer. The rule is, however, not confined to cases where the paper is payable to drawer or maker. It is generally held that if the drawer selects as payee the name of even a real person, and forges not only the drawer's name but the payee's, a presenting holder may keep the proceeds. Phillips vs. Mercantile National Bank, 140 N. Y., 556; Bartlett vs. First National Bank, 247 Ill., 490; Snyder vs. Corn Exchange National Bank, 221 Pa. St., 599; Coggill vs. American Exchange Bank, 1 N. Y., 113; Trust Company vs. Hamilton Bank, 127 App. Div., 515. National Bank of Commerce vs. United
23 States, 224 Fed. R. 679, though at first blush it seems to be an exception, in fact went off on another point, page 681, and recognizes the general rule.

It is true that the decisions are not unanimous. First National Bank vs. N. Y. Bank, 152 Ill., 296; McCall vs. Corning, 3 La. Am., 409, and it takes only slight evidence of participation to defeat the holder, Bank of Danvers vs. Bank of Salem, 151 Mass., 280, but it is none the less true that where the foregoing facts are badly presented, the better considered cases protect the presenting holder. Yet when the forger draws a note to the name of a payee, either real or fictitious, and the drawee or maker accepts it supposing the name to be real, no subsequent negotiation of it by the forger gives a valid title and if the drawee pays, he may recover. Shipman vs. Bank of N. Y., 126 N. Y., 318; Seaboard Bank vs. Bank of America, 193 N. Y., 26; Jordan Marsh & Co. vs. Bank, 201 Mass., 397; Tolman vs. American National Bank, 22 R. I., 462. These last cases are not contrary in principle; they depend upon the fact that the drawee or maker has intended as payee a person other than the forger. If the maker really intends to make the forger payee, even under a false name, his indorsement is good. Roberts vs. Coleman, 141 Mass., 231. It is quite true that Bank of England vs. Vagliano, 1891 App. Cas., 107, does not accord with these cases, and with deference it is doubtful whether the judgments of Lord Bowen below and Lords Bramwel and Field

above are not to be preferred where the matter is still open. The effect of the decision was indeed to compel Vagliano to pay to the order of Glyka, the clerk, when he had agreed only to pay to the order of Petridi & Co. Moreover, the result of the decision
24 has been hardly more than to add to §28 a clause, which had been supposed to be already a part of the common law. The case in any event has nothing to do with that now at bar.

Price vs. Neal, supra, has been a source of much difference of opinion. Lord Mansfields principle that the loss should fall where it chances, while often commended (The doctrine of Price vs. Neal, 4 How. L. R., 297), has not escaped question. It must be confessed that it is hard upon that theory to explain the unform recovery where a valid bill has been stolen and forged and the presenting holder has innocently collected the money. The usual explanation is that having converted the bill, the holder has been guilty of a wrong at law and it is not equally innocent with the drawee, but surely that is a conventional distinction, not properly applicable to an action supposed to turn upon natural justice. Moreover, it is difficult to see why the drawee is not as much of a converter as the presenting holder. He has as little right to meddle with the property of the actual holder as the presenting holder and his putative payment is no payment at all. Such difficulties may best be left till they arise, because in the case at bar there was neither an actual bill nor a genuine holder. As the bill was a forgery and created no obligation, it could make not the slightest difference to the drawee what endorsements it bore, or whether or not they were genuine. The bill being void could never be presented by the true owner, assuming the payee ever became its true owner. Now, in the case of a genuine bill stolen and forged, the wrong done the drawee who pays
25 on the forged endorsement is only that he must pay again, a wrong which can not arise when the bill is a forgery. Hence the forgery of the endorsement was wholly irrelevant even if the bill had been stolen from the actual payee.

But the bill never had been delivered and if it had been genuine the forgery would have been equally irrelevant. Any holder or the drawer might fill a genuine bill with the names of distinguished persons and forge their endorsements without affecting his rights or the drawee's obligation, because the drawee looks only to the drawer and to the title of the holder from the person to whom or for whom the drawer actually first delivered the bill. The actual holder may pass his actual title by any name that he has been called in the bill and he may add any endorsements to real persons whom he may choose if he avoids delivery to them. It is not to be thought that the secret purpose of any holder in endorsing the name of a person not a holder is an exception to the universal rule that secret intent is never material. The explanation is that as respects the drawee all such endorsements are not part of the contract, since a drawee cannot hold endorsers, and need only an authentic drawer and his true appointee by order, however named.

From no aspect can those cases be supported which treat the forgery of the payee's name as relevant. Indeed, from the report in Burrows it seems likely that in Price vs. Neal, Lee, the forger, forged the endorsements along with the bill itself.

A verdict will be directed for the defendant.

April 21, 1917.

L. H.,
D. J.

26 *Extract of minutes.*

At a stated term of the District Court of the United States, for the Southern District of New York, held at the United States court rooms, in the U. S. Courthouse and Post Office Building, in the borough of Manhattan, city of New York, on the 28th day of March, in the year of our Lord one thousand nine hundred and seventeen.

Present: Honorable Learned Hand, District Judge.

UNITED STATES
vs.
CHASE NATIONAL BANK. } L15–139.

Now comes the plaintiff by John B. Walker, assistant U. S. attorney, and moves the trial of this cause. Likewise comes the defendant by Rushmore, Bisbee & Stern, its attorneys, and Henry R. Stern and Jas. F. Sandifur, of counsel. By stipulation of counsel on both sides, Harry Nichols impaneled and sworn as a jury of one. At the close of the testimony on both sides, each side moves for a direction of a verdict.

Thereafter on Saturday, April 21, 1917, by direction of the court, verdict for the defendant. See opinion on file.

An extract from the minutes.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk.

27 *Judgment.*

District Court of the United States, for the Southern District of New York.

UNITED STATES OF AMERICA,
plaintiff,
against
THE CHASE NATIONAL BANK,
defendant.

The issues in this cause having been brought on for trial on the 28th day of March, 1917, at a stated term of the District Court of

the United States, for the Southern District of New York, before Hon. Learned Hand and a jury, and said cause having been tried on said day, and the plaintiff and the defendant having thereupon at the close of the case moved for a direction of a verdict, and the court after due deliberation having duly directed a verdict for the defendant on the 21st day of April, 1917.

Now, on motion of Rushmore, Bisbee & Stern, attorneys for the defendant, it is

Ordered, adjudged and decree that the defendant have judgment against the plaintiff on the merits.

Dated, May 14th, 1917.

ALEX. GILCHRIST, Jr.,
Clerk.

28 *Bill of exceptions.*

United States District Court, Southern District of New York.
Before Hon. Learned Hand, J., and jury.

UNITED STATES
vs.
CHASE NATIONAL BANK.

NEW YORK, *March 28, 1917—3 p. m.*

APPEARANCES.

H. Snowden Marshall, Esq., United States attorney, for the Government;

Joseph A. Burdeau, Esq., John E. Walker, Esq., of counsel, assistant U. S. attorneys.

Rushmore, Bisbee & Stern, Esqs., attorneys for defendant;

Henry R. Stern, Esq., James F. Sandefur, Esq., of counsel.

The court: This cause came on for hearing before me and a jury of one by stipulation between the parties; said jury of one being duly sworn and impaneled, the cause is opened by counsel for the United States and for the defendant respectively. Thereupon
29 the plaintiff offers in evidence stipulation of facts dated March 2, 1917, which is duly received and marked Plaintiff's Exhibit 1, and a supplementary stipulation, dated March 2, 1917, which is received and marked Plaintiff's Exhibit 2.

United States District Court, for the Southern District of New York.

UNITED STATES OF AMERICA, plaintiff,

against

THE CHASE NATIONAL BANK, defendant.

The parties hereto hereby stipulate, by their respective attorneys, that, for the purposes of the trial of the above-entitled action, the following facts are admitted, and are deemed to be evidence in this action:

1. That at all the times herein mentioned, the plaintiff was and is a corporation sovereign.

2. That at all the times herein mentioned, the defendant was and is an association organized for and transacting the business of banking in the city, State and Southern District of New York, under and pursuant to the provisions of the acts of Congress in such case made and provided.

30 3. That at all the times herein mentioned, Howard National Bank was and is an association organized for and transacting the business of banking in Burlington, State and District of Vermont, under and pursuant to the acts of Congress in such case made and provided.

4. That at all the times herein mentioned, the Treasurer of the United States was the general disbursing officer for the Treasury Department of the United States of America, the plaintiff herein, and as such was the agent and representative of the plaintiff in paying drafts and checks drawn by the other disbursing officers of the plaintiff; and that all drafts and checks drawn by quartermasters or acting quartermasters of the United States Army for funds which such quartermasters or acting quartermasters were entitled to disburse, were drawn by such officials upon the Treasurer of the United States; that quartermasters and acting quartermasters of the United States Army were comprehended within the term "disbursing officers" of the United States, and that at all such times it was the duty of the said Treasurer to honor and pay drafts and checks drawn upon him by E. V. Sumner, second lieutenant of the Second Cavalry of the United States Army, as acting quartermaster. That the said Howard National Bank knew said E. V. Sumner and on many occasions prior to December 15, 1914, had cashed checks or drafts drawn by him as such acting quartermaster upon said Treasurer, and bearing his genuine signature and endorsement. That the last check or draft drawn by said E. V. Sumner, as such acting quar-

31 termaster upon said Treasurer, prior to December 15, 1914, was check or draft No. 443, dated October 20, 1914; that from October 20, 1914, to January 20, 1915, Captain Wilson G. Heaton was quartermaster at Fort Ethan Allen, near Burlington, Vermont,

and as such quartermaster drew checks or drafts upon the Treasurer of the plaintiff; that on January 20, 1915, said E. V. Sumner as such acting quartermaster drew two such checks or drafts, one payable to the order of the Burlington Wood Company for $214 in payment for wood for the Second Cavalry of the United States Army in the field, and the other transferring the balance claimed by the plaintiff to be held to his credit in the plaintiff's Treasury to said Captain Wilson G. Heaton.

5. That on the 11th day of February, 1913, the plaintiff herein, acting through its Treasury Department, opened a general deposit account with the defendant. In connection with the opening of such account and during the continuance of the same, there was certain correspondence between the plaintiff and the defendant herein, and the plaintiff delivered to the defendant certain circulars or circular letters. Said correspondence and circulars or circular letters contained all the agreements between the said parties in relation to such account, and copies thereof, marked "Exhibits A to L," both inclusive, are hereto annexed and made a part hereof. Exhibits "A," "G," "I," and "K" are copies of letters sent by the plaintiff to the defendant each of which was received by the defendant on or about the day immediately following the date thereof. Exhibits "B," "C," "H" and "L" are copies or
32 duplicates of circulars or circular letters sent by the plaintiff to the defendant and received by the defendant on or about their respective dates, except that the circular of which Exhibit "B" is a copy was enclosed with the letter of which Exhibit "A" is a copy, and was received by the defendant on or about January 30, 1913. Exhibit "D" is a copy of a telegram from the defendant to the plaintiff, sent by defendant and received by the plaintiff on or about the day of its date, to wit, January 31, 1913. Exhibit "E" contains copies of two telegrams, the first from the plaintiff to the defendant and the second from the defendant to the plaintiff, both sent and received on or about January 31, 1913. Exhibits "F" and "J" are copies of letters sent by the defendant to plaintiff on their respective dates and received by plaintiff on the days following their respective dates.

6. That on the 15th day of December, 1914, one John A. Howard, a first-class sergeant and pay clerk of the Quartermaster's Corps of the United States Army, who was stationed at Fort Ethan Allen in the State of Vermont, negotiated to the said Howard National Bank at Burlington, Vermont, the check or draft, mentioned in the complaint, of which the following is a photographic copy:

WAR
QUARTERMASTER

Office of the Quartermaster,
Fort Ethan Allen, Vermont.

December 15, 1914

444

Treasurer of the United States

PAY TO THE ORDER OF E. V. Sumner, 2d Lt., 2d Cav., AQM $3571.47

Dec. 18

Thirty five hundred seventy one & 47/100# DOLLARS

OBJECT FOR WHICH DRAWN

Vo. No. Cash transfers

(SIGNED) *E. V. Sumner*
ACTING QUARTERMASTER, U. S. A.

21739

33 At the time said Howard negotiated said check or draft as aforesaid, it bore the purported endorsement of the payee therein named, as shown on the photographic copy below. That thereafter and on the same day, the Howard National Bank endorsed the said draft or check to the order of and forwarded it to, its correspondent, the said The Chase National Bank, which bank thereupon stamped the back of said draft or check and forwarded it to the Treasurer of the United States, at Washington, D. C.; that the following is a photographic copy of the back of said draft or check after said endorsement and stamp were placed thereon:

FORM APPROVED BY THE
COMPTROLLER OF THE TREASURY
JANUARY 27, 1913

This check must be indorsed on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

(SIGNED) *E. V. Sumner*

(Sign on this line.)

2d Lt., 2d Cav., AQM

Pay Chase National Bank
NEW YORK, OR ORDER
Restrictive Endorsements Board ?
HOWARD NAT'L BANK
58-3 BURLINGTON, VT. 58-3
H. T. RUTTER, Cashier.

Received Payment ?
THE TREASURER OF THE UNITED STATES
DEC 16 '94
1-74 THE CHASE NATIONAL BANK 1-74
OF THE CITY OF NEW YORK.

34 That the letters, words and figures, "2d Lt., 2d Cav., AQM.," appearing on said draft are, wherever they appear, a contraction for "second lieutenant, Second Cavalry, Acting Quartermaster," and the letters "U. S. A." under the name of the drawer of said draft are a contraction for "United States Army."

That the said John A. Howard was designated sergeant, first class, Quartermaster Corps. A sergeant, first class, Quartermaster Corps, might have several duties. Such grade is comparatively a new designation in the United States Army. The said John A. Howard was one of about six men who were designated by the plaintiff to

35 take a course of instruction in Washington, D. C., to fit them to fill places as pay clerks, or to fill positions as finance clerks in the offices of quartermasters at posts of the United States Army. At the time the said E. V. Sumner became Acting Quartermaster of the United States Army in charge of the office of the quartermaster of the United States Army at Fort Ethan Allen, near Burlington, Vermont, the said John A. Howard was acting in the capacity of finance clerk in said office and had been in that position since the summer of 1913, he having relieved a pay clerk. His duties were handling all papers relating to finance that came into said office, he acting as pay clerk to the plaintiff's disbursing officer at said Army post and, in fact, handled all monetary papers concerned in the transactions of the department of the plaintiff's quartermaster at said Fort Ethan Allen, near Burlington, Vermont. That the said Howard National Bank, on December 15, 1914, knew said John A. Howard as such clerk.

That the said Howard National Bank, not knowing or suspecting that the said draft or check, of which a photographic copy is set forth above, or any signature thereto or endorsement thereon was forged, and not knowing or suspecting any irregularity in connection with the making or indorsement of the said draft or check or defect in the title thereto or with respect to the right of the said Howard to negotiate the same, or to receive the proceeds of such negotiation, or otherwise with respect thereto, cashed the said draft or check and paid the said Howard the face amount thereof, to wit, $3,571.47, when it was presented by him, as aforesaid, on December 15, 1914.

In making this stipulation the plaintiff does not concede that

36 the Howard National Bank should not have suspected that the signature of the maker and the signature of the endorser were forged. On the 15th day of December, 1914, after cashing said draft or check, as aforesaid, the said Howard National Bank endorsed it to the order of the Chase National Bank, as appears from the photographic copy hereinabove set forth, and forwarded it by mail to the defendant bank for collection for its account and for deposit to the credit of its account. That on the 16th day of December, 1914, the defendant, at its office in the city of New York received said draft or check in the usual course of business from the said Howard National Bank for collection for its account and for deposit as aforesaid. That, at said time, both the said Howard National Bank and

the plaintiff herein maintained deposit accounts with the defendant, and that, upon receipt of said instrument, the amount thereof was, on the 16th day of December, 1914, credited by the defendant to the account of the Howard National Bank and charged by the defendant against the account of the plaintiff. Thereupon and on the same day the defendant stamped the back of said instrument as appears from the photographic copy of the back thereof hereinabove set forth, and that said instrument, together with a notice, showing that the defendant had become the holder thereof and that the defendant had deducted the amount thereof from the credit balance in the account of the plaintiff with the defendant, was, on said date, duly forwarded by mail by the defendant to the Treasurer of the plaintiff, at the city of Washington, in the District of Columbia. That in due course and on the 17th day of December, 1914, the Treasurer of
37 the plaintiff received the said draft or check, together with said notice, and thereafter, to wit, on the 18th day of December, 1914, duly paid the same by crediting the amount thereof to the defendant in its books of account.

7. That on December 16, 1914, the amount of said instrument was duly credited by the defendant to the Howard National Bank and due notice was given by it to said Howard National Bank; thereafter and before the discovery of said forgery as hereinabove stated, and prior to December 31, 1914, the said The Chase National Bank paid the said Howard National Bank or upon its order, and charged the same to the account of said Howard National Bank, various sums of money in excess of the amount to the credit of the account of the said Howard National Bank with the defendant, at either the time or immediately after the time defendant received said draft or check and credited the amount thereof to the account of the said Howard National Bank, as aforesaid, but the credit of the said Howard National Bank in said account with the defendant, during said period, was always in excess of the amount of said draft or check, owing to deposits made by it after the amount of said draft or check was so credited to its account on December 16, 1914; that in connection with said account, no special or specific direction or directions as to the application of deposits or as to credits or charges were given by the said Howard National Bank and no special appropriation or appropriations were made by the defendant.

8. That the said instrument, purporting to be a draft or check, was drawn on a form supplied by the plaintiff to said E. V. Sum-
38 ner, second lieutenant, Second Cavalry of the United States Army, acting quartermaster at Fort Ethan Allen, near Burlington, in the State of Vermont, for use in drawing checks or drafts upon the Treasurer of the United States; that the words appearing above the name "E. V. Sumner" on the back of said instrument forged as aforesaid were printed thereon, and that the same printed words appeared on the backs of all checks or drafts furnished by the plaintiff to said E. V. Sumner.

9. That the name of said "E. V. Sumner," written above the printed words, "Acting Quartermaster, U. S. A.," as the drawer of said draft or check and the name of said "E. V. Sumner," above the typewritten letters and figures, "2d Lt., 2 Cav., AQM.," endorsed upon the back of said draft or check were forged and were wrongfully and fraudulently written upon the same by said Howard; and that the typewritten name or designation of the payee, "E. V. Sumner, 2d Lt., 8d Cav., AQM.," was so written in by said Howard, and that all the acts of the said Howard in connection with said draft or check were part of a scheme on his part wrongfully and fraudulently to obtain the amount of said draft or check and to convert the same to his own use. That none of the monies so received by said Howard from the Howard National Bank ever came into the possession of said E. V. Sumner and the said E. V. Sumner never derived any personal or official benefit from the transaction.

10. That the amount of said draft or check, to wit, $3,571.47, was greater than the amount for which said E. V. Sumner, second lieutenant, Second Cavalry of the United States Army, acting
39 quartermaster, was entitled to draw upon the Treasurer of the plaintiff on the 15th, 16th, 17th, or 18th of December, 1914, and the officials of the plaintiff's Treasury Department sent him a notice on December 24, 1914, that his account was overdrawn and inquired why it was overdrawn. He replied to the plaintiff that Howard, his clerk, was on a furlough and he would reply to the inquiry as soon as Howard returned. On December 29, 1914, the plaintiff sent said E. V. Sumner a telegram, requesting him to expedite the matter. Upon receipt of such telegram, he investigated his papers and accounts and discovered said forgery and notified the said Howard National Bank of said forgery on December 31, 1914.

11. That the defendant did not know that the signature of the said E. V. Sumner, over the words and letters "Acting Quartermaster, U. S. A.," as maker of said draft or check and over the letters and figures, "2d Lt., 2d Cav., AQM.," as the endorser of said draft or check, or in either of said capacities, was forged and had no notice of any such forgery or any irregularity connected therewith until the 2d day of January, 1915, when it was advised thereof by the Howard National Bank by a letter of the Howard National Bank dated December 31, 1914, of which letter a copy, marked "Exhibit M," is hereto annexed and made a part hereof. Said Howard National Bank, in turn, had received notice of such forgery from said E. V. Sumner on the 31st day of December, 1914, but had not received any such notice from the plaintiff or its Treasury Department.

That the defendant, on January 2, 1915, forwarded a copy of
40 said letter, of which "Exhibit M," hereto annexed is a copy, to the plaintiff in a letter dated January 2, 1915, of which a copy marked "Exhibit N," is hereto annexed and made a part hereof. That said letter, of which "Exhibit N," hereto annexed is a copy, with the enclosure therein mentioned, was received by the plaintiff on January 4, 1915, January 3, 1915, being a Sunday, and was replied to in

due course, by the plaintiff by a letter dated January 4, 1915, which was received by the defendant on January 5, 1915, and of which last-mentioned letter a copy, marked "Exhibit O," is hereto annexed and made a part hereof. That the defendant was not advised that the plaintiff claimed that the signature or endorsement of said check or draft was forged and received no notice whatever from the plaintiff in connection with such forgery until the receipt of the last-mentioned letter, as aforesaid. In answer to the last-mentioned letter, the defendant on January 8, 1915, wrote a letter to the plaintiff, of which a copy, marked "Exhibit P" is hereto annexed and made a part hereof, which was received by the plaintiff on or about January 9, 1915. In answer to the last-mentioned letter, the plaintiff on or about January 12, 1915, wrote and sent to the defendant a letter, of which a copy, marked "Exhibit Q" is hereto annexed and made a part hereof, received by the defendant on or about January 13, 1915, and in reply to the last-mentioned letter the defendant on January 15, 1915, wrote and sent to the plaintiff a letter, of which a copy, marked "Exhibit R," is hereto annexed and made a part hereof, which was received by the plaintiff on or about January 16, 1915.

12. That since the first day of June, 1913, the negotiable
41 instruments laws of Vermont and New York, constituting a part of the statute laws of said States, have contained the following provisions (the section number of the New York statute being placed in parenthesis after the corresponding number of the Vermont statute):

Section 1 (20). "Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements:

(1) It must be in writing and signed by the maker or drawer:

(2) Must contain an unconditional promise or order to pay a sum certain in money;

(3) Must be payable on demand, or at a fixed or determinable future time;

(4) Must be payable to order or to bearer; and

(5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

* * * * * * *

Section 9 (28). "When payable to bearer. The instrument is payable to bearer:

(1) When it is expressed to be so payable; or

(2) When it is payable to a person named therein or bearer; or

(3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

(4) When the name of the payee does not purport to be the name of any person; or

42 (5) When the only or last indorsement is an indorsement in blank."

* * * * * * *

Section 15 (34). "Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

* * * * * * *

Section 16 (35). "Delivery; when effectual; when presumed. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved."

* * * * * * *

43 Section 23 (42). "Forged signature, effect of. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

* * * * * * *

Section 25 (51). "Consideration; what constitutes. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at future time."

Section 30 (60). "What constituted negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery."

* * * * * * *

Section 52 (91). "What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions:

(1) That it is complete and regular upon its face;

44 (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

(3) That he took it in good faith and for value;

(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

13. That prior to the commencement of the above-entitled action, the plaintiff duly requested the defendant to repay to it the amount of said draft, to wit, $3,571.47, but the defendant has failed and refused to pay the same, or any part thereof, to the plaintiff.

Dated, New York, March 2, 1917.

H. SNOWDEN MARSHALL,
Solicitor and Attorney for Plaintiff, U. S. Attorney for the Southern District of New York.
RUSHMORE, BISBEE & STERN,
Solicitor and Attorneys for Defendant.

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45 EXHIBIT A.

TREASURY DEPARTMENT,
OFFICE OF ASSISTANT SECRETARY,
WASHINGTON, *January 29, 1913.*

CASHIER CHASE NATIONAL BANK,
New York, N. Y.

SIR: A change in the method of making disbursements and handling the receipts of the Government has been decided on by the Secretary of the Treasury which will make necessary a more extended use of national banks as Government depositaries. The details of this change are outlined in the attached Treasury circular. In brief, it contemplates that national bank depositaries shall have one general account with the Treasurer of the United States and shall pay the checks of disbursing officer when presented in the regular course of business, and charge the same to the Treasurer's general account and forward them to Washington, the same day. In order to provide as many points of payment as can conveniently be done to accommodate payees of the Goverment, it has been determined to increase the deposit with your bank, should you wish it, to $200,000. This is done with the understanding that should an account of this size not be required after the plan has been thoroughly tried out, a reduction in your balance will be made. On the other hand, should the Government business warrant a larger balance with your bank,
46 an adjustment on that basis can also be made. It is the plan of the Secretary to establish the new system on February 1st, and your early decision in the matter will be greatly appreciated.

The security for deposits may include bonds of the following character:

Any United States bonds. Philippine, Porto Rican, District of Columbia, Hawaiian, Philippine Railway Company, and Manila Railroad Company bonds.

Should you decide to accept this proposition to become a depositary, you will please notify the Department; and you may also furnish the bonds to secure the deposit at your earliest convenience, when you will be regularly designated under section 5153 of the Revised Statutes.

Respectfully,

(Sgd.) R. O. BAILEY,
Assistant Secretary.

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47 EXHIBIT B.

ALL WARRANTS AND CHECKS TO BE DRAWN ON THE TREASURER OF THE UNITED STATES, PAYABLE BY ANY ASSISTANT TREASURER OR ANY ACTIVE DESIGNATED DEPOSITARY BANK.

1913. Treasury Department,

DEPARTMENT CIRCULAR No. 5,
OFFICE OF THE SECRETARY,
Washington, January 9, 1913.

Treasurer U. S.

To disbursing officers of the United States, Assistant Treasurers, designated depositary banks, and others concerned:

For the purpose of bringing the ordinary fiscal transactions of the Federal Government more nearly into harmony with present business practices, it has been determined that the daily receipts of the Government shall be placed with the national-bank depositaries to the credit of the Treasurer of the United States. Disbursements will be made by warrant or check drawn on the Treasurer, but payable by national-bank depositaries, as well as by the Treasury and sub-treasuries, in accordance with the following regulations:

1. On and after February 1, 1913, every deposit of funds to the official credit of a disbursing officer shall be made with the
48 Treasurer of the United States, except as provided in paragraph 10. All moneys standing to the official credit of disbursing officers with Assistant Treasurers and active designated depositary banks at the close of business January 31, 1913, shall be transferred to the official credit of such disbursing officers with the Treasurer of the United States, through the medium of the general account of the Treasurer of the United States.

2. On and after February 1, 1913, all Treasury Department warrants, Post Office Department warrants, disbursing officers' checks, checks in payment of interest on the public debt, and Secretary's

special deposit checks shall be drawn on the Treasurer of the United States, except as provided in paragraph 10.

3. It is contemplated that each active designated depositary bank shall pay Treasury Department warrants, Post Office Department warrants, disbursing officers' checks, checks in payment of interest on the public debt, pension checks, and Secretary's special deposit checks, dated on and after February 1, 1913, and drawn on the Treasurer of the United States, when presented in due course of business, under the same conditions as other checks are now paid. Assistant Treasurers and the treasury of the Philippine Islands shall pay all such warrants and checks, observing the same precautions as at present. Warrants and checks so paid shall be charged to the general account of the Treasurer of the United States as a transfer of funds by the bank, Assistant Treasurer, or treasury of the Philippine Islands making the payment.

4. Checks and warrants dated prior to February 1, 1913, shall be paid on presentation by the Treasurer, Assistant Treasurer, or designated depositary bank on which drawn and charged to the general account of the Treasurer of the United States in the manner prescribed by paragraph 3.

5. Except as provided in paragraph 10, each disbursing officer shall, beginning on February 1, 1913, conduct his business with the Treasurer of the United States in the same manner as he now conducts his business with the Treasurer, an Assistant Treasurer, or an active designated depositary bank.

6. Beginning on February 1, 1913, each Assistant Treasurer, each active designated depositary bank, and the treasury of the Philippine Islands shall each day schedule and forward to the Treasurer of the United States all warrants and checks paid in accordance with the requirements of paragraphs 3 and 4. The amounts of warrants and checks so paid and forwarded shall be charged in the regular transcripts of the general account of the Treasurer of the United States as transfers of funds.

7. A disbursing officer having in his hands disbursing funds or moneys received as a special deposit, and desiring to deposit the same to his official credit with the Treasurer of the United States, shall make the deposit with the Treasurer, an Assistant Treasurer, or an active designated depositary bank. The Treasurer, Assistant Treasurer, or bank shall issue a certificate of deposit in duplicate showing that the deposit is to be placed to the credit of the depositing officer with the Treasurer of the United States. The duplicate certificate will be delivered to the depositing officer. The original will be forwarded by the first mail to the Treasurer of the United States and the amount thereof will be credited in the transcript of the general account of the Treasurer of the United States as a transfer of funds.

8. Deposits to the credit of the Treasurer of the United States on account of revenues or repayments to appropriations shall be made in accordance with existing regulations.

9. All disbursing officers will be supplied with blank checks by the Treasury Department. Any officer not receiving a supply of such checks by February 1, 1913, shall use the supply now on hand, striking out the title of the Assistant Treasurer or active designated depositary bank and inserting "The Treasurer of the United States."

10. Deposits to the official credit of disbursing officers stationed in the Philippine Islands who at present have no other depositary account shall be made with the treasury of the Philippine Islands as heretofore, and such officers shall draw their checks on the treasury of the Philippine Islands as heretofore. The treasury of the Philippine Islands shall pay checks and warrants drawn on the Treasurer of the United States as provided in paragraph 3.

11. These regulations do not apply to postal funds (except
51 Post Office Department warrants) and court funds deposited under the provisions of sections 995 and 996, Revised Statutes.

FRANKLIN MACVEAGH,
Secretary.

EXHIBIT C.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, January 18, 1913.

To Assistant Treasurers of the United States, designated depositary banks, and others concerned:

The following instructions are issued supplementary to Treasury Department Circular No. 5, dated January 9, 1913, directing that disbursements be made by warrants or checks drawn on the Treasurer of the United States, payable by any assistant treasurer or any active designated depositary bank.

SPECIAL DEPOSITARY BANKS NOT AFFECTED BY CIRCULAR.

1. Banks designated as special depositaries of public moneys are not affected by the circular. Its provisions apply only to those banks designated as active depositaries.

TRANSFER OF DISBURSING OFFICERS' BALANCES TO CREDIT OF TREASURER OF THE UNITED STATES.

2. The second portion of paragraph 1 of Circular No. 5
52 requires that this transfer be made at the close of business on January 31, 1913. Each disbursing officer's account will be closed at that time by transfer of the balance to the credit of the general account of the Treasurer of the United States. The aggregate of the balances transferred will be taken up in the transcript of the general account for the period ending January 31, 1913. A

certified list of the balances so transferred will be transmitted to the Treasurer of the United States at the earliest possible moment, so that the Treasurer may use such list as authority for entering the initial credits in the accounts of the several disbursing officers. No action by disbursing officers will be necessary to effect this transfer. Balances of accounts the paid checks for which are not at present sent to the Division of Public Moneys will not be transferred without further instructions.

PAYMENTS OF WARRANTS AND CHECKS DATED PRIOR TO FEBRUARY 1, 1913.

3. Warrants and checks dated prior to February 1, 1913, coming into the hands of an assistant treasurer or active designated depositary bank other than the one on which drawn should not be scheduled and forwarded to the Treasurer of the United States, but should be forwarded to the assistant treasurer or bank on which drawn, which alone can make payment on such warrants and checks.

CHECKS DRAWN ON AN ASSISTANT TREASURER OR DESIGNATED DEPOSITARY BANK AFTER JANUARY 31, 1913.

4. Should any disbursing officer, after January 31, 1913,
53 draw checks on an assistant treasurer or designated depositary bank with whom he formerly had an account, said checks should be paid by such assistant treasurer or bank in the manner prescribed by paragraphs 3 and 4 of Circular No. 5. The assistant treasurer or bank should, however, at once direct the attention of the disbursing officer to the requirement of paragraph 2 of Treasury Department Circular No. 5 that all checks shall be drawn on the Treasurer of the United States.

INDORSEMENTS ON PAID WARRANTS AND CHECKS.

5. An assistant treasurer, The Treasury of the Philippine Islands, or an active designated depositary bank paying a warrant or check under the provisions of paragraph 3 or 4 of Circular No. 5 shall plainly stamp its indorsement on the face of such warrant or check, as follows:

Received payment from
The Treasurer of the United States.
(Date.)

(Bank No.) (Bank No.)

(Name of assistant treasurer or bank.)

DISBURSING OFFICERS DESIGNATED BY NUMBER.

6. In accordance with the plan set forth in a separate circular, now in course of preparation, a system of numerical symbols has been devised for use in designating disbursing officers, and

54 a number has been assigned to each officer and to each class of warrants, interest checks, and Secretary's special deposit checks, coming within the provisions of Circular No. 5. The symbol number will be printed, stamped, or written in the lower righthand corner of each warrant or check. All disbursing officers are being supplied with new checks, so that the system should be in general use within a short time. A symbol number will be assigned to each former disbursing officer who has checks outstanding and each assistant treasurer and active designated depositary bank will be supplied with a list showing the number assigned to each officer when the list is completed. Whenever the symbol number of a disbursing officer or of a class of warrants or checks is known that number should appear on the schedule of warrants and checks paid, both in the recapitulation of payments on the first page of the blank and at the heading of each detailed list of the checks of a particular disbursing officer, or class of warrants or checks. When the numbers are so used the name of the disbursing officer or title of the class of warrants or checks may be omitted at the head of each detailed list, but should appear in the recapitulation.

LISTING OF WARRANTS AND CHECKS ON SCHEDULE.

(Form 11–N. B.)

7. Paid warrants and checks will be listed on Form No. 11–N. B., in duplicate, in accordance with the printed instructions on the blank.

55 The original copy will be forwarded to the Treasurer, accompanied by the paid warrants and checks, arranged in the same order as they appear on the schedule. The duplicate will be retained for the files of the assistant treasurer or bank. Treasury Department warrants should be arranged in one list giving the number, prefixed by the class of warrant, as "Miscellaneous Series," "War," "Indian," etc. Post Office Department warrants constitute one class. There are several classes of checks in payment of interest on the public debt; on each check the class is clearly indicated, as "Consols of 1930," "Philippine loan of 1915–36, public improvement bonds," "District of Columbia 3.65% loan," etc.

BANK NUMBERS UNDER THE NUMERICAL SYSTEM OF THE AMERICAN BANKERS' ASSOCIATION.

8. The form of schedule of warrants and checks paid contains a space for bank number. In this space will be inserted the number assigned to the assistant treasurer or bank under the numerical system of the American Bankers' Association.

DEPOSITS TO AN OFFICER'S OFFICIAL CREDIT UNDER PARAGRAPH 7 OF CIRCULAR NO. 5.

9. When a deposit is received to be placed to the depositing officer's official credit with the Treasurer of the United States, under the

provisions of paragraph 7 of Circular No. 5, a certificate of deposit in duplicate will be issued in the following form:

I certify that_____has this day deposited to the credit of the general account of the Treasurer of the United
56 States_____/100 dollars as a transfer of funds to be placed with the Treasurer of the United States to the official credit of _____ on account of _____, for which I have signed certificates in duplicate.

A supply of forms for this purpose will be furnished, but until such forms are received assistant treasurers will use Form 1710 and banks Form 1–N. B., making alterations to adapt them to the purpose.

DEPOSITS TO THE CREDIT OF SECRETARY'S SPECIAL DEPOSIT ACCOUNTS NOS. 3 AND 5.

10. When a deposit is received to be placed to the credit of "Secretary's special deposit account No. 3" or "Secretary's special deposit account No. 5" a certificate of deposit in duplicate will be issued in the form prescribed in the preceding paragraph. The duplicate certificate will be delivered to the depositor and the original forwarded to the Treasurer of the United States by the first mail. The amount of the deposit should be credited to the general account of the Treasurer of the United States as a transfer of funds. The certificates of deposit required in such cases by Circular No. 46, dated July 1, 1907, will be issued by the Treasurer of the United States.

DEPOSITS FOR CREDIT OF THE SERVICE OF THE POST OFFICE DEPARTMENT.

11. When a deposit is received to be credited to the account
57 for the service of the Post Office Department, a certificate of deposit in triplicate will be issued in the following form:

I certify that _____ has this day deposited to the credit of the general account of the Treasurer of the United States _____ /100 dollars as a transfer of funds, to be placed with the Treasurer of the United States to the credit of the account for the service of the Post Office Department, for the (month) (half month) or (quarter) ending _____, 191 , for which I have signed certificates in triplicate.

The original copy will be mailed direct to the Auditor for the Post Office Department, the duplicate to the Treasurer of the United States, and the triplicate to the depositing officer. A supply of forms will be furnished, but until such forms are received Assistant Treasurers will use Forms 1705–a and 1705–b, and banks Form 1½–N. B., making alterations to adapt them to the purpose.

FORMS DISCONTINUED.

12. On and after February 1, 1913, the use of the following-described forms will be discontinued:

Certificates of deposit: Secretary's special deposit account, No. 1704, Assistant Treasurers; Post Office Department account, Nos.

1705–a and 1705–b, Assistant Treasurers, and No. 1½, national banks; special deposits of customs officers, Nos. 1717–a and 1717–c.

Assistant Treasurers, and 2–a and 2–d, national banks. Transcripts of Secretary's special deposit account:

58 Nos. 1741, Assistant Treasurers, and 3, national banks. Transcripts of Post Office Department account:

Nos. 1743–a and 1743–b, Assistant Treasurers, and 5, national banks.

R. O. BAILEY,
Assistant Secretary.

EXHIBIT D.

Paid January 31. 3

R. O. BAILEY,
Assistant Secretary,
Treasury Department, Washington, D. C.

Referring your letter January twenty-ninth would deposit be subject to interest; if so, what rate?

CHASE NATIONAL BANK OF NEW YORK.

EXHIBIT E.

THE CHASE NATIONAL BANK,
New York. (Private wire.)
No. 1600 9 collect.

January 31st, 1913. 191 Time WU Washington, D. C., Jany. 31st, 1913.

Chase.

59 No interest charged on contemplated deposit.

BAILEY,
Asst. Secretary. 234Pm.

Our reply Jan. 31. "Refer your letter 29th, we will accept deposit with pleasure, and will deposit bonds as soon as possible."

CHASE NATIONAL BANK.

EXHIBIT F.

FEB. 1, 1913.

Honorable R. O. BAILEY,
Asst. Secretary, Treasury Department, Washington, D. C.

SIR: Referring to your letter of January 29th, we beg to confirm our telegram of yesterday, advising that we should be pleased to receive the additional deposit mentioned therein, $199,000. Two hundred thousand dollars of Government bonds to secure this in-

creased deposit will be lodged with the department on Monday, or not later than Tuesday.

We understand that we shall be designated as a regular depositary. Kindly have sent to us the necessary forms and the instructions under which we should act in the handling of this account.

Thanking you for the consideration shown us,

Yours, very truly,

S. H. MILLER, *Vice President.*

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60 EXHIBIT G.

OFFICE OF ASSISTANT SECRETARY,
TREASURY DEPARTMENT,
Washington, February 11, 1913.

CASHIER CHASE NATIONAL BANK, *New York, N. Y.*

SIR: The Treasurer of the United States having advised this office of the receipt from you of $200,000 bonds furnished in accordance with the authority given you in department letter of Jan. 29, 1913, the designation of your bank is hereby changed from that of a temporary depositary to a depositary for regular purposes and you are authorized to hold a fixed balance of $200,000 until further advised.

The necessary blanks to be used in connection with this designation have been sent you and your attention is invited to the instructions printed thereon and to those contained in the circulars enclosed herewith.

You are requested to withdraw the $1,000 U. S. bonds held to secure that amount deposited with you under your designation as temporary depositary. A form for the necessary resolution is enclosed herewith.

Respectfully,

(Sgd.) R. O. BAILEY, *Assistant Secretary.*

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61 EXHIBIT H.

TREASURY DEPARTMENT,
OFFICE OF THE TREASURER OF THE UNITED STATES,
Washington, February 13, 1913.

To active designated depositary banks:

The following instructions MUST be closely observed to obviate the necessity of returning paid checks, together with the daily schedule (Form 11), to banks for correction and completion.

1. The following indorsement MUST be plainly stamped on the FACE of warrants and checks forwarded to this office with the daily schedule of warrants and checks paid:

Received payment from
The Treasurer of the United States
(Date paid.)
(Bank No.) Name of bank. (Bank No.)
Location.

2. The entry in the space "Date paid," on the schedule, should agree with the indorsement on the FACE of warrants and checks.

3. The form of schedule of warrants and checks paid contains a space for bank number. In this space should be inserted the
62 number assigned to the bank under the numerical system of the American Bankers' Association. Your No. is 1–74.

4. The provision of circular No. 5 which requires that all money standing to the credit of the disbursing officers with Assistant Treasurers and active designated depositary banks be transferred to the official credit of such officers with the Treasurer of the United States does NOT apply to postmasters' accounts and court funds deposited under the provisions of sections 995 and 996, Revised Statutes, or to those accounts the paid checks for which have not been heretofore sent to the Division of Public Moneys.

5. The checks of each disbursing officer should be listed in one group by number and amount in chronological and numerical sequence, with the name or symbol number of the disbursing officer appearing at the head of each group.

A total MUST be shown for each group.

6. In the recapitulation by classes and disbursing officers, the amount for each class or disbursing officer should be shown in one line under the caption "Title of group." If the disbursing officer's symbol number appears in the lower right-hand corner of the check, or is otherwise known, it should appear in the column headed "Symbol." If it is not known, the space must be left blank.

Treasury Department warrants constitute one class and but ONE total therefore should appear in the recapitulation.

63 Post Office Department warrants constitute one class.

The interest checks of EACH loan constitute one class.

The grand total of each schedule MUST appear at the end of the recapitulation.

7. Under the caption "Aggregate deposits, transfers, and balances, this day," the item "Deposits to credit of Treasurer U. S." includes funds credited in the Treasurer's general account.

"Transfers of excess deposits" includes transfer of funds, made for the purpose of reducing the balance to the authorized limit.

"Balance to official credit of others" includes postmaster's accounts, court funds, etc., mentioned in paragraph 4 of these instructions.

This information MUST be forwarded to this office daily on the schedule (Form 11a) even if no checks are paid. Discontinue sending "Daily Report of Receipts and Disbursements" (Form 2½).

8. Always begin the listing and the recapitulation on Form 11a, continuing the listing on 11c and the recapitulation on 11b, when necessary.

9. The spaces on the schedule headed "Examined," "Verified," "Punched," "Posted" and to following blank spaces are NOT to be filled in by the bank.

C. S. PEARCE,
Assistant Treasurer.

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64 EXHIBIT I.

TREASURY DEPARTMENT,
OFFICE OF ASSISTANT SECRETARY,
Washington, Feb. 18, 1913.

CASHIER CHASE NATIONAL BANK,
New York, N. Y.

SIR: I am advised by the Treasurer of the United States that he has not received any daily schedules from your bank showing that you have paid Government warrants and checks under the provisions of Treasury Department Circular No. 5, dated January 9, 1913, and charged the same to the general account of the Treasurer of the United States, in accordance with the requirements of paragraph 6 of said circular.

It is contemplated that an active designated depositary bank will pay all Government warrants and checks drawn on the Treasurer of the United States, when presented in due course of business, under the same conditions and with the same rights and responsibilites as it now pays commercial checks drawn on another bank. It is required by paragraph 6 of Circular No. 5, that warrants and checks so paid are to be scheduled and forwarded to the Treasurer of the United States at Washington daily, the amounts thereof to be charged in the regular transcripts of the general account of the Treasurer of the United States as transfers of funds.

65 It is the intention of the department to so deposit the daily revenues of the Government as to keep each active depositary bank supplied with sufficient funds to pay all Government warrants and checks presented, and to keep the balance of its account with the Treasurer of the United States up to the authorized amount. If revenues are not sufficient, funds will be transferred to the bank for that purpose.

Please inform the department whether your bank is now handling any warrants and checks which come within the provisions of Treasury Department Circular No. 5. If so, is it your intention for the future to charge the same to the general account of the Treasurer of the United States and to schedule and forward the warrants and checks to the Treasurer daily?

The department is now making readjustments of deposits with active depositary banks with the view of providing each with a sufficient balance to properly care for its Government business. The daily schedule of warrants and checks paid and forwarded is a good indication of the amount of such business transacted by a particular bank.

Respectfully,

(Sgd.) R. O. BAILEY,
Assistant Secretary.

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66 EXHIBIT J.

FEB. 19, 1913.

Honorable R. O. BAILEY,
ASST. SECRETARY U. S. TREASURY,
Washington, D. C.

SIR: Replying to your circular letter of the 18th inst., we beg to advise that up to the present no checks have been presented for payment at our counter, and such checks and warrants as were received from our correspondents we have collected from the Sub-Treasury here, through the Clearing House, as usual. We understand, however, that it is your intention that we should pay all checks drawn on the Treasurer of the United States, received from our customers, charge them to his account, and forward on the same day. We shall be pleased to do this, beginning tomorrow.

We receive a very large number of items, and we understand that the department supplies envelopes which pass through the mail without postage stamps. If we are correct, kindly have a supply of large envelopes forwarded to us.

We beg to inquire whether the items which we shall send you will be promptly examined upon arrival in Washington and any irregular checks returned the same day. This is quite important to us in our relations with our correspondent banks. We shall be obliged if you will give instructions to the division having this matter in
67 charge, to advise us by wire the non-payment, for any reason, of any checks for $500 and upwards, stating the name of the last endorser.

The amount of items which we shall forward daily will doubtless exceed by a considerable sum the amount of our deposit, and we will advise you by wire as early in the day as possible the amount of checks we shall forward, and we hope it will be convenient for the Department to notify the Assistant Treasurer in this city to pay us the amount before the close of business.

Very respectfully,

S. H. MILLER,
Vice President.

EXHIBIT K.

ASSISTANT SECRETARY,
TREASURY DEPARTMENT,
Washington, February 21, 1913.

MR. SAMUEL H. MILLER,
Vice President the Chase National Bank,
New York, N. Y.

DEAR SIR: Replying to your communication of the 19th instant, you are advised that you will be supplied with official franked envelopes for mailing paid checks to the Treasurer of the United
68 States. In case you have more checks than an ordinary envelope will hold, the official franked envelope may be placed on the outside of the package.

It is intended that the work of examining checks in the Treasurer's office will be so conducted that in case a warrant or check is rejected, the bank from which it was received will be notified not later than the next day after its receipt. The Treasurer of the United States has been notified of your request to be advised by wire in case any check for $500 or upwards is rejected.

Very truly, yours,

(Sgd.) R. O. BAILEY,
Assistant Secretary.

EXHIBIT L.

Amendment of circular dated January 18, 1913, and letter of instructions of February 13, 1913, relating to checks.

Circular letter.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, May 20, 1913.

To Assistant Treasurer of the United States, designated depositary banks, and other concerned:

On January 18, 1913, this office issued a circular of instructions, section 5 of which is as follows:
69 "Indorsements on paid warrants and checks."

5. An assistant treasurer, the treasury of the Philippine Islands, or an active designated depositary bank paying a warrant or check under the provisions of paragraph 3 or 4 of Circular No. 5 shall plainly stamp its indorsement on the FACE of such warrant or check as follows:

Received payment from
The Treasurer of the United States.
(Date.)
(Bank No.) (Name of Assistant Treasurer or bank.)
(Bank No.)

The foregoing was later embodied in letter of instructions sent out from the Treasurer's office under date of February 13, 1913, since which time the instructions have been followed by stamping the receipt for payment upon the FACE of warrants and checks.

The stamping of such receipt upon the FACE of such warrants and checks in many cases obliterates the writing and figures so as to interfere with the keeping of accounts in the Treasurer's office. It is therefore ordered that that part of section 5 of the circular issued by this office under date of January 18, 1913, and that part of section 1 of the letter of instructions from the Treasurer's office under date of February 13, 1913, which provides that the indorsement shall be placed upon the FACE of such warrants and checks, be, and the same is hereby, rescinded, and you are instructed to stamp
70 said indorsement, as provided in said circular and letter of instructions, upon the BACK of such warrants and checks, and in such place AS NOT TO OBLITERATE any other writing or figures.

JOHN SKELETON WILLIAMS,
Assistant Secretary.

EXHIBIT M.

(Copy.)

Copy.

HOWARD NATIONAL BANK,
Burlington, Vt., Dec. 31, 1914.

CHASE NATIONAL BANK,
New York City.

GENTLEMEN: On Dec. 15th we sent you in our cash letter a check for $3,571.47 drawn on the Treasurer of the United States. We have been informed today that the signature on the check was forged, but it was paid on the 18th by the Treasurer and the money has been paid over to the man who presented it here and he has left town. If the Treasurer of the U. S. wishes to charge the check back to you we do not want you to accept it, as so much time has elapsed since they paid it that the forger has had ample time to get away.
71 We are told that he was in Burlington within two or three days and we have reported the matter to the Burns Detective Agency, who will have man here to-morrow to take up the case.

Yours, very truly,

(Signed) H. T. RUTTER,
Cashier.

EXHIBIT N.

JAN. 2, 1915.

Hon. TREASURER OF THE UNITED STATES,
Washington, D. C.

SIR: For your information we beg to hand you herewith copy of communication we have today received from our valued correspondent, the Howard National Bank, Burlington, Vt., relative to a check for $3,571.47 drawn on the Treasurer of the United States.

Yours, very truly,

W. E. PURDY,
Assistant Cashier.

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72 EXHIBIT O.

Office of
Treasurer of the United States
in replying quote initials GFA

TREASURY DEPARTMENT,
Washington, January 4, 1915.

CASHIER CHASE NATIONAL BANK,
New York, N. Y.

SIR: With reference to your letter of the 2nd instant, inclosing a copy of a letter to your bank from the Howard National Bank of Burlington, Vermont, relative to check No. 444, drawn on the Treasurer of the United States for $3,571.47, you are advised that the matter had been taken up with Lt. E. V. Sumner, A. Q. M., Fort Ethan Allen, Vt., by wire, and he has requested the return of the check through the indorsers, for the reason that his signature and indorsement thereon were forged by J. A. Howard, a first-class sergeant in the Quartermaster Corps.

The signature of this check was examined at the time of its receipt from your bank, but the forgery was so well made that it was not detected. The fact that this forgery was not discovered immediately does not relieve the Howard National Bank of Burlington, Vt., which first cashed the check. The original check is being referred to the Secret Service Division of the Treasury Department, by
73 which an investigation will be made and an attempt made to apprehend the forger.

The photographic copy of the check is returned herewith and you are directed to credit $3,571.47 in your current daily transcript of account with the Treasurer of the United States, on line 3, referring to this letter as your authority therefor. The photographic copy should then be forwarded by you to the Howard National Bank for reclamation of payment.

Respectfully,

(Sgd.) JOHN BURKE,
Treasurer.

PEH
Inclosure.

GTA.

EXHIBIT P.

JANUARY 8th, 1915.

GFA

Hon. JOHN BURKE,
Treasurer of the United States,
Washington, D. C.

SIR: Upon receipt of your favor of the 4th instant referring to check #444 drawn on the Treasurer of the United States for $3,571.47 purporting to be signed by Lt. E. V. Sumner and
74 cashed by our correspondent the Howard National Bank of Burlington, Vermont, we referred the matter to such correspondent and beg to advise you that its president has informed us that his institution cannot accept any responsibility in the premises and declines to sanction our charging the amount of the check to the account of his bank. Under these circumstances it has been necessary for us to go into the matter further.

We have, therefore, considered the situation and have been unable to find any distinction between the situations of the Treasurer of the United States with respect to this check and that of a deposit bank, with respect to a check drawn by its depositor. As you are aware, in the latter case, the bank is charged with knowledge of the signature of its depositor and is, therefore, responsible for any loss resulting from the payment by it of a check upon which the name of its depositor has been forged.

If, however, you consider that the situation of the Treasurer of the United States is different from that of a bank, we shall be obliged if you will give us your views fully upon the point and beg to assure you that they will not only have our careful attention but that we will transmit them to our correspondent, upon whom any loss resulting from the transaction must ultimately fall.

Respectfully, yours.

S. H. MILLER,
Vice President.

75

EXHIBIT Q.

TREASURY DEPARTMENT,
Washington, January 12, 1915.

Office of Treasurer of the United States.
In replying quote initials GFA.

CASHIER CHASE NATIONAL BANK,
New York, N. Y.

SIR: With reference to your letter of the 8th instant, relative to check No. 444, drawn on the Treasurer of the United States, for $3,571.47, purporting to be signed by Lt. E. V. Sumner, Q. M. C.,

you are advised that the endorsement of the name of E. V. Sumner on the check as well as the signature on the face of the check is a forgery.

It has been held by the Comptroller of the Treasury that the received payment stamp of a government depositary guarantees prior endorsements and in case any question arises relative thereto, the recourse of this office is to the National Bank depositary from which the check was received. In a similar case, the Comptroller of the Treasury has also held that a fraudulent check cannot be considered a government obligation and the holder thereof has no such
76 claim as authorizes the Treasurer of the United States to make payment thereon. Your recourse in this case is to the bank from which you received the check and whose indorsement appears thereon.

It is learned informally from the Secret Service Division that the forger has been apprehended and will be taken to Burlington, Vt., for trial; also that the officers who apprehended him found $1,400 of the proceeds of this check in his possession, and it is hoped that a large part of the balance may be recovered.

You are therefore directed to credit the amount of this check in your current transcript of account with the Treasurer of the United States on line 3, referring to this letter as your authority therefor.

Respectfully,

JOHN BURKE,
Treasurer.

PEH

EXHIBIT R.

JAN. 15, 1915.

Hon. JOHN BURKE,
Treasurer of the United States,
Washington, D. C.

SIR: Replying to your letter of the 12th instant, we beg to say that we have carefully considered the suggestions therein contained, with the following result:

77 With reference to the conclusion of the comptroller that the "Received payment stamp of a Government depositary guarantees prior endorsements," it is our understanding that such is the rule as between banks. In the case under consideration, however, it appears to us that when a cheque is payable to the order of the maker, the endorsement thereof by the maker for the purpose of giving the same currency is not such an endorsement as comes within the rule. Ordinarily, a cheque is complete when it contains the name of a drawer, a drawee and a payee. When, however, the instrument is payable to the order of the drawer, it is not complete until he endorses it. Accordingly, the next holder of such an instrument bears the same relation thereto that is, ordinarily, borne by the payee, and we respectfully submit that the rule which you mention was

established with respect to endorsements in due course and should not, therefore, be held to apply to other than a second endorsement of an instrument of the character now under question.

With reference to your suggestion that a fraudulent cheque cannot be considered a Government obligation and that the holder thereof has no such claim as authorizes the Treasurer of the United States to make payment thereon, we beg to say that our views are entirely in accord with this general statement and we consider that, if a fraudulent cheque were presented to the Treasurer of the United States, notwithstanding that the holder thereof had obtained the same innocently and for value, no duty would devolve upon the Treasurer to make payment thereof. We submit most respect-
78 fully, however, that such consideration should not apply where the Treasurer has examined a cheque purporting to be drawn by a duly authorized disbursing officer of the United States and accepted the same as genuine, as the result of which the National Bank depositary has credited the amount of the cheque to its endorser, and, thereby, changed its position to such extent that, without the consent of its endorser, it can not be made whole, which is the position now occupied by this bank.

Please understand that we find it necessary to dispose of this matter from the standopint of the legal rights of the parties, because of the fact that the Howard National Bank, at Burlington, Vermont, declines to accept any responsibility in the premises. If the decisions of the comptroller apply directly to the facts in hand, we shall be very glad to give them every consideration to which they are entitled and, notwithstanding the attitude of our customer, to accept such conclusions, if we shall conclude that they are sound. We will, therefore, esteem it a favor if you will forward us copies thereof, in order that we may give them our serious attention.

Respectfully, yours,

H. N. CONKEY, *Cashier.*

79 United States District Court, for the Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
THE CHASE NATIONAL BANK, DEFENDANT.

The parties hereto hereby stipulate, by their respective attorneys, that for the purposes of the trial of the above entitled action, competent witnesses, if sworn as witnesses for the defendant on such trial, would testify to the following:

That John A. Howard, who forged the signature and endorsement of E. V. Sumner to the check or draft involved in this action, presented the said draft or check to the Howard National Bank for payment at Burlington, Vermont, on December 15, 1914, and received

payment thereof from the said Howard National Bank at said time, the amount of said payment being the face of said draft or check, to wit, $3,571.47. That, after procuring the payment of said draft or check as aforesaid, the said Howard remained at Burlington, Vermont, until the night of December 17, 1914, when he left by train for Boston, Massachusetts, in company with a woman known as "Violet Lovejoy" or "Violet Lovedale," who had been living at the house of Kirt Stervant, in Burlington, Vermont, for upwards of six
80 months. Kirt Stervant was at the railway station in Burlington, Vermont, when the said Howard and the woman left there and saw them there. The ticket clerk at the railway station in Burlington knew Howard and sold him two tickets for Boston, Massachusetts, for the train which left Burlington on December 17, 1914, at 10.55 p. m., and which was due to arrive in Boston, Massachusetts, at 7.05 a. m., on the morning of December 18, 1914. At the same time, the said ticket clerk sold Howard two Pullman or sleeping car tickets for section 11, of car 14 of the same train. The night baggageman at said railway station in Burlington knew Howard and saw him board said train. He checked for Howard a large black trunk with yellow straps, one such strap on each end thereof, and saw Howard carrying a large leather satchel or bag with a drawer at the bottom. Howard had the trunk and satchel or bag with him when arrested in Winnipeg, Manitoba, as hereinafter stated, on January 6, 1915. Howard was seen by an acquaintance on the main street of Portland, Maine, on December 21, 1914, and stopped at the Falmouth Hotel, in Portland, Maine, with the said woman, from December 19th to December 23rd, 1914, inclusive, under the name of "J. A. Howard and wife." That the said Howard and the said woman were married in Portland, Maine, on December 24, 1914, by C. H. Davis, under the names of "John A. Klaverweiden" and "Violet Marie Lovedale," respectively. Said Howard and his wife visited his mother and half-brother in Chicago, Illinois, from December 26, 1914, to January 1, 1915. His half-brother at that time worked for the Pullman Palace Car Company, at its shops in Pullman, near Chicago, Illinois.
81 Said Howard and his wife left Chicago by train for Winnipeg, Manitoba, on January 1, 1915, and arrived at the last-mentioned place on January 5, 1915. He was followed there by detectives employed by the American Bankers Association, of which the said Howard National Bank was a member, and was arrested there, upon information supplied by said detectives, on January 6, 1915, for the forgery hereinabove mentioned. Thereafter said Howard was returned to Burlington, Vermont, where he pleaded guilty in the United States District Court to the indictment for said forgery and was sentenced to imprisonment in the United States penitentiary at Atlanta, Georgia. When arrested, as aforesaid, in Winnipeg, Manitoba, he and his wife turned over to the authorities who arrested him the sum of $1,466.00, the portion of the proceeds of said draft or check which he had not spent, which sum was turned over to and is still held by officials of the plaintiff.

And this stipulation may be read on such trial with the same force and effect as if such witnesses then testified as witnesses as aforesaid, subject to objections as to relevancy and materiality.

Dated, New York, March 2nd, 1917.

H. SNOWDEN MARSHALL,
Solicitor and Attorney for Plaintiff,
U. S. Attorney for the Southern District of New York.
RUSHMORE, BISBEE & STERN,
Solicitors and Attorneys for Defendant.

82 Thereupon plaintiff rested and the defendant rested.

Each side thereupon moves for a direction of a verdict.

Thereupon the cause was adjourned over and the jury excused until the 21st day of April, 1917, at which time the cause was adjourned on the said 28th day of March, 1917.

The parties met pursuant to adjournment and the court thereupon directed the jury to bring in a verdict for the defendant, and the jury having been directed so to do, finds a verdict for defendant, as directed.

Plaintiff excepts.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHASE NATIONAL BANK.

It is hereby stipulated that the foregoing bill of exceptions be settled and signed as a true and correct record in the form proposed, and that the same be ordered on file by the trial judge herein as part of the record.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Plaintiff.
RUSHMORE, BISBEE & STERN,
Attorneys for Defendant.

83 The foregoing constitutes all the evidence and proceedings on the trial of this action and for as much as the exceptions, matters and things would not otherwise appear in the record, I have settled and signed this bill of exceptions on the prayer of the plaintiff by its count, and it is

Ordered, that the same be filed as a part of the record herein, nunc pro tunc as of the day of the trial.

Dated, New York, October 10, 1917.

LEARNED HAND,
United States District Judge.

Assignment of errors.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
CHASE NATIONAL BANK, DEFENDANT.

Now comes the United States of America, by Francis G. Caffey, United States attorney for the Southern District of New York, its attorney, and makes and files the following assignment of
84 errors which it alleges occurred upon the trial of this action, and upon which it will rely in the prosecution of its writ of error herein:

1. The court erred in directing a verdict for defendant.
2. The court erred in refusing to direct a verdict for the plaintiff.

Wherefore the United States of America prays that the judgment herein for the manifest errors aforesaid, and for other errors in the record and proceedings herein may be reversed and for naught held and esteemed and that it may be restored all matters and things which it has lost, by reason of said judgment, and that the United States District Court for the Southern District of New York may be directed to enter judgment herein in favor of the United States of America for the relief demanded in the complaint.

Dated, New York, October 30th, 1917.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Plaintiff.

85 *Citation.*

By the Honorable Julius M. Mayer, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To the Chase National Bank, greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the borough of Manhattan in the city of New York, in the district and circuit above named, on the 28th day of November, 1917, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern District of New York, wherein The United States of America is plaintiff in error and you are defendant in error to show cause, if any they be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the District and Circuit above named, this 30th

day of October, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-second.

J. M. MAYER,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

86 *Stipulation.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE CHASE NATIONAL BANK, DEFENDANT.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

Dated, Nov. 22, 1917.

FRANCIS G. CAFFEY,
United States Attorney, Attorney for Plaintiff.
RUSHMORE, BISBEE & STERN,
Attorneys for Defendant.

87 *Clerk's certificate.*

United States of America, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
vs.
THE CHASE NATIONAL BANK, Defendant.

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said district court in the above-entitled matter as agreed on by the parties.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 27th day of November, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the said United States the one hundred and forty-second.

ALEX GILCHRIST, Jr., *Clerk.*

88 United States Circuit Court of Appeals for the Second Circuit.

No. 190—October Term, 1917.

Argued February 21, 1918. Decided March 13, 1918.

UNITED STATES OF AMERICA, Plaintiff in error, (plaintiff below), against THE CHASE NATIONAL BANK, Defendant in error (defendant below).	In error to the District Court of the United States for the Southern District of New York. Before WARD, ROGERS, and HOUGH, circuit judges.

Writ of error to judgment entered by direction of the court in the District Court for the Southern District of New York.

Lieutenant E. V. Sumner, United States Army, was quartermaster at Fort Ethan Allen, Vermont, and as such a disbursing officer having authority to draw drafts or checks on the Treasury of the United States. Sergeant Howard was his pay clerk, and as such known at a national bank in the near-by city of Burlington. Howard drew on the usual official blank a draft on the Treasurer of the United States to the order of Lieutenant Sumner, apparently
89 signed by Sumner as Quartermaster, and by him endorsed in blank. In fact Howard forged the name of Sumner both as maker and endorser, and then cashed his forgery over the counter at the said bank in Burlington.

That institution in usual course endorsed the draft to defendant (its New York correspondent), which presented it and received payment from the Treasury. The forgery having been discovered, the United States brought this suit to recover the amount paid—as for a payment made under mistake as to facts. Verdict and judgment having been ordered for defendant on the whole case, this writ was taken.

Joseph A. Burdeau, assistant United States attorney, for plaintiff in error.

Charles E. Rushmore, for defendant in error.

Per curiam:

We have recently pointed out in United States v. Bank of New York, 219 F. R., 648, that the United States can no more repudiate its acceptance and recover what its Treasurer paid on a bill with drawer's name forged than can a private person.

The distinction taken on this writ, and said to make a difference in result, is that not only was the drawer's name forged, but so was the endorser's, and it is argued that this first, though forged, endorsement was guaranteed by the presenting bank—this defendant.

But the name used for drawer, payee, and endorser was the same, and of course there was no intent on the forger's part that Lieutenant Sumner should either receive the proceeds of draft or know of its existence; he did intend that the one falsely named as payee should never have any interest in the bill, and such name was inserted as belonging to a man to whom such a draft might naturally be made payable.

Therefore the forged draft was payable to bearer under the negotiable instruments law (in force in Vermont, New York,
90 and District of Columbia), because it was payable to order of a "fictitious or non existing person and such fact was known to the person making it so payable." (Bank v. Vagliano Bros. L. R. (1891) App. Cas., 107; Trust Co. v. Hamilton Bank, 127 App. Div., 515; Snyder v. Corn Exchange Bank, 221 Pa., 599.)

Judgment affirmed.

91 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 23d day of March, one thousand nine hundred and eighteen.

Present: Hon. Henry G. Ward, Hon. Henry Wade Rogers, Hon. Charles M. Hough, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,

v.

CHASE NATIONAL BANK, DEFENDANT IN ERROR.

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

H. G. W.

H. W. R.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

92 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. v. Chase Natl. Bank. Order for mandate. United States Circuit Court of Appeals Second Circuit. Filed Mar. 25, 1918. William Parkin, clerk.

93 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

CHASE NATIONAL BANK, DEFENDANT IN ERROR.

The United States of America, the plaintiff in error above named, feeling itself aggrieved by the judgment and order of the United

States Circuit Court of Appeals for the Second Circuit entered herein on the 25th day of March, 1918, in the above-entitled cause, affirming the judgment of the United States District Court for the Southern District of New York herein, hereby prays this court for a writ of error to the United States Supreme Court in this cause, and that the transcript of the record and proceedings and papers upon which the said judgment was made and entered, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated, New York, June 6, 1918.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Attorney for Plaintiff in Error.

The writ of error as prayed for in the foregoing petition is hereby granted and allowed this 7th day of June, 1918.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

94 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error, vs. Chase National Bank, defendant in error. Petition for writ of error. Francis G. Caffey, United States Attorney, Attorney for United States. Service of a copy of the within is hereby admitted. Dated New York, June 7, 1918. Rushmore, Bisbee & Stern, attorney for defendant in error. To Rushmore, Bisbee & Stern, attorney for defendant in error. United States Circuit Court of Appeals, Second Circuit. Filed June 8, 1918. William Parkin, clerk.

95 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
CHASE NATIONAL BANK, DEFENDANT IN ERROR.

Now comes the United States of America by Francis G. Caffey, United States attorney for the Southern District of New York, its attorney, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to wit:

I. The United States District Court for the Southern District of New York erred in directing a verdict for defendant.

II. The United States District Court for the Southern District of New York erred in refusing to direct a verdict for the plaintiff.

III. This court erred in affirming the judgment of the United States District Court for the Southern District of New York, entered herein on the 14th day of May, 1917, and in not reversing the same.

IV. This court erred in holding and deciding that the forged instrument mentioned in the complaint herein, purporting to be a draft drawn upon the Treasurer of the United States for the sum of $3,571.47, was payable to bearer under the negotiable instrument law

because it was payable to order of a "fictitious or nonexisting person and such fact was known to the person making it so payable."

96 Wherefore, the United States of America prays that the order and judgment of this court, affirming the judgment of the United States District Court for the Southern District of New York, and that the judgment of the United States District Court for the Southern District of New York for the errors aforesaid and for other errors in the record and proceedings herein may both be reversed and for naught held and esteemed and that it may be restored to all claims that it has lost by reason of such orders and judgments.

Dated, June 6, 1918.

FRANCIS G. CAFFEY,
United States Attorney
for the Southern District of New York,
Attorney for the United States of America.

97 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error, v. Chase National Bank, defendant in error. Assignment of error. Francis G. Caffey, United States attorney, attorney for United States. Due service of a copy of the within is hereby admitted. Dated New York, June 7, 1918. Rushmore, Bisbee & Stern, attorney for deft. in error. to Rushmore, Bisbee & Stern, attorneys for deft. in error. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 8, 1918. William Parkin, clerk.

98 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 97, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of United States against Chase National Bank as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 10th day of June, in the year of our Lord one thousand nine hundred and eighteen and of the independence of the said United States the one hundred and forty-second.

[SEAL.] WM. PARKIN, *Clerk.*

99 By the Honorable H. G. Ward, one of the judges of the United States Circuit Court of Appeals for the Second Circuit.

To THE CHASE NATIONAL BANK,
Defendant in Error.

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the city of

Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Second Circuit wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment or order in said writ of error mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand in the borough of Manhattan, city of New York, in the circuit above named, on the 7th day of June, in the year of our Lord one thousand nine hundred and eighteen and of the independence of the United States the one hundred and forty-second.

H. G. WARD,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

100 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error, vs. Chase National Bank, defendant in error. Citation. Francis G. Caffey, United States attorney, attorney for United States. Service of a copy of the within is hereby admitted. Dated New York, June 7, 1918. Rushmore, Bisbee & Stern, attorneys for deft. in error, to Rushmore, Bisbee & Stern, attorneys for deft. in error.

101 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable, the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Second Circuit, before you, or some of you, between United States of America, plaintiff in error, and Chase National Bank, defendant in error, manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears,

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf,

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of
102 the United States, the 7th day of June, in the year of our Lord

one thousand nine hundred and eighteen and of the independence of the United States the one hundred and forty-second.

[SEAL.] WM. PARKIN,
Clerk of the Circuit Court of Appeals for the Second Circuit.

The foregoing writ is hereby allowed.

H. G. WARD,
U. S. Circuit Judge.

103 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error, vs. Chase National Bank. Writ of error. Francis G. Caffey, United States attorney, attarney for United States. Service of a copy of the within is hereby admitted. Dated New York, June 7, 1918. Rushmore, Bisbee & Stern, attorneys for deft. in error, to Rushmore, Bisbee & Stern, attorneys for deft. in error. Filed June 8, 1918. William Parkin, clerk.

(Indorsement on cover:) File No. 26588. U. S. Circuit Court Appeals, 2d Circuit., Term No. 502. The United States of America, plaintiff in error, vs. The Chase National Bank. Filed June 13th, 1918. File No. 26588.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1918

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AUTHORITIES CITED.

THE STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 134.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

THE CHASE NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The United States brought suit in the District Court for the Southern District of New York to recover $3,571.47 paid to the defendant, the Chase National Bank, by the Treasurer of the United States upon a forged Treasury draft. Judgment for the defendant in the District Court was affirmed by the Circuit Court of Appeals. The United States sued out this writ of error.

THE FACTS.

The instrument in question was dated December 15, 1914, and purported to be drawn on the Treasurer of the United States by Lieutenant E. V. Sumner, as acting Quartermaster of the U. S. Army at Ft. Ethan Allen, near Burlington, Vermont, payable to his own order and endorsed by him in blank. It was presented, on the day it bore date, to the Howard National Bank, in Burlington, Vt., by one John A. Howard, a finance clerk in the office of the Quartermaster at Ft. Ethan Allen, who had forged Sumner's signature as drawer and endorser (R. 17–21).

Prior to October 20, 1914, the Howard National Bank had frequently cashed such checks on the Treasurer of the United States drawn by Sumner as Acting Quartermaster. The last check prior to the one in question had been drawn by Sumner on October 20th, and thereafter Captain Wilson G. Heaton was Quartermaster at Ft. Ethan Allen and as such drew checks upon the Treasurer (R. 16).

The Bank, knowing all these facts, paid Howard the amount of the check without making any inquiry as to his authority to receive it and without requiring him to endorse it. It endorsed the check in blank with the usual guaranty of indorsements and forwarded it to the defendant for collection and deposit (R. 21).

The defendant received the check in the usual course of business on December 16, 1914, and credited the account of the Howard National Bank with the amount for which it was drawn (R. 21). At the same

time, pursuant to an arrangement between it and the government, of whose funds it was a depositary (R. 17), the defendant charged the plaintiff's account with the same amount, stamped it "Received Payment" and forwarded it to the Treasurer of the United States. The Treasurer received the check thus stamped on December 17, 1914, and on the following day credited the defendant with this amount in its books of account (R. 22).

The forged instrument purporting to be the check of Lieut. Sumner as Acting Quartermaster overdrew his account with the Treasurer, and on December 24, 1914, the Treasury Department notified Lieut. Sumner of that fact, and asked for an explanation. He replied that his clerk Howard was on a furlough and that he would reply to the inquiry as soon as Howard returned. On December 29, 1914, the plaintiff by telegraph requested Lieut. Sumner to expedite the matter. The latter then investigated his accounts, discovered the forgery, and notified the Howard National Bank thereof on December 31, 1914. The Howard National Bank thereupon advised the defendant of the forgery in a letter dated December 31, 1914, which was received January 2, 1915 (R. 23).

Between December 16, 1914, and the time of the discovery of the forgery, the Howard National Bank had at all times on deposit with the defendant more than the amount of the check on which Sumner's signatures had been forged (R. 22).

THE STATUTES.

The following statutes are deemed to be material to the determination of the issues of this suit.

Sec. 9 (3) of the Uniform Negotiable Instruments Law, in force at the time of the transactions here involved in Vermont, New York and the District of Columbia provides as follows:

> Sec. 9. When payable to bearer. The instrument is payable to bearer * * *
>
> (3) When it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable.*

Revised Statutes Sec. 3620 provides, so far as is material here, that—

> It shall be the duty of every disbursing officer having any public money entrusted to him for disbursement to * * * draw for the same *only in favor of the person to whom payment is made.*

THE CONTENTIONS OF THE PARTIES.

This is in substance an action for money had and received wherein plaintiff, having paid the check in question under the mistaken belief that it was a genuine instrument, seeks to recover the amount so paid, as money paid under a mistake of fact which the defendant ought not, in equity and good conscience, to retain.

The defendant while recognizing the general principle thus invoked contends that this case does not fall within it, but rather within the special rule that one who has paid a check drawn upon him cannot

deny the genuineness of the drawer's signature. It contends that this rule is inflexible and admits of no exceptions; that it must be applied no matter how inequitable may be the result of its application to the circumstances of any particular case; that the rule was so laid down by Lord Mansfield in *Price* v. *Neale*, 3 Burr. 1354, the leading case on the subject and has been the law ever since.

The plaintiff contends that the rule in *Price* v. *Neale* applies only where the defendant is himself entirely free from fault; that it is inapplicable where, as here, the defendant, or the Howard National Bank, in whose shoes the defendant stands, by its negligent acts and omissions contributed to the success of the deception, and has not acted to its detriment in reliance on the fact that the drawee has paid the check.

If the defendant is not liable to plaintiff because of the forgery of the drawer's signature then certainly, plaintiff insists, defendant is liable on its guaranty of the payee's endorsement. To defendant's contention that the check is payable to bearer because the nominal payee was not intended by the forger to have any interest in it and hence was a fictitious person within the meaning of the Negotiable Instruments Law, plaintiff replies that if the defendant insists that Sumner's signature as drawer must be regarded as genuine for the purposes of its defense, since he is the designated payee such payee can not be considered fictitious and therefore the check is not payable to bearer. Plaintiff replies further that under the Negotiable Instruments Law a negotiable

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instrument is payable to a fictitious payee only when the person making it so payable did not intend that the nominal payee should have any interest in it, and in this case Howard's intent that the payee should have no interest in the check can not be imputed to Sumner or the plaintiff. For this reason also the check is not payable to bearer. But if it be regarded as payable to the bearer that can not avail the defendant in view of R. S. Sec. 3620 above set forth.

Finally plaintiff denies that it was negligent in not sooner discovering and notifying the defendant of the forgery and contends that even if it was negligent, that does not bar recovery in this suit because the defendant was guilty of the first negligence in cashing the check.

ARGUMENT.

I.

The plaintiff may recover of the defendant money paid the latter on a forged check since the defendant did not change its position to its prejudice in reliance on the fact of payment and since its indorser was guilty of acts of negligence contributing to the success of the forgery.

The question whether the plaintiff is entitled to recover in this action must be considered as if this were a suit between plaintiff and the Howard National Bank, hereinafter referred to as the "Bank." There are no greater equities in favor of the defendant than there are in favor of that Bank. The defendant claims that because the check was sent it for collection and deposit to the account of that Bank and because the

defendant, prior to the discovery of the forgery, credited the Bank with the amount of this check, notified it of this credit, and paid it various sums in excess of the amount to the credit of the Bank with defendant either at the time or immediately after the time it credited the amount of the check to the Bank, it became a *bona fida* purchaser of the check for value. But the law recognizes no such thing as a holder in due course of a negotiable instrument void in its inception because of the forgery of the drawer's signature. Therefore the defendant merely stood in the shoes of the Bank. If plaintiff is permitted to assert as against the latter that the drawer's signature was forged, he may also do so against the defendant.

As between plaintiff and the Bank it is clear that the circumstances of this case bring it not within the rule that one who has paid a check drawn upon him cannot deny the genuineness of the drawer's signature, but within the exceptions to it.

On December 15, 1914, one Howard, a finance clerk in the office of the Quartermaster of the United States Army at Ft. Ethan Allen, near Burlington, Vermont, presented to the Bank a check purporting to be drawn on the Treasurer of the United States by one Lieutenant E. V. Sumner, as acting Quartermaster at Ft. Ethan Allen, payable to his own order and endorsed by him in blank. The Bank must have known that for almost two months prior to the presentation of this check Captain Heaton and not Lieut. Sumner had been acting as Quartermaster at

Ft. Ethan Allen, and as such had been signing all checks that were drawn by that office on the Treasurer of the United States. This circumstance alone should have aroused its suspicion as to the authority of Howard, whom it knew to be a clerk in the office of the Quartermaster, to cash the check. The slightest investigation on its part would have disclosed that the check was a forgery; but it paid the money to Howard without attempting any investigation of his authority to receive it and without requiring his endorsement.

It is true that Howard's endorsement on the check was not necessary for negotiation; but the custom of bankers, so universal that this Court will take judicial notice of it, requires a person receiving payment of a check or draft to endorse his name on it as a form of receipt and as a means of identification. Morse, Banks and Banking, 5th Ed. Sec. 391. This is especially true where the check is being cashed by a bank on whom it is not drawn.

The check when presented to the treasurer of the plaintiff showed no indorsements intervening between that of Sumner and the bank. The treasurer was justified, therefore, in believing that the money had been paid to Sumner in person. Under these circumstances the bank's guaranty of Sumner's endorsement amounted to a representation that it knew it to be genuine. Since his signatures as drawer and endorser were indistinguishable such a guaranty could not but allay any suspicion plaintiff might have as to the genuineness of his signature

as drawer. It certainly amounted to a statement that the bank did not intend to call on the Treasurer to verify the signature. Had Sumner not actually signed this check as drawer, its endorsement by him would have been an adoption of the signature as payee. The treasurer could not believe that the bank which cashed the check would endorse it and guarantee a prior endorsement without assuring itself that the signature guaranteed by it was genuine. Had plaintiff been doubtful of the signature it might well rely upon that guaranty as evidence that the drawer's signature was genuine. This is sufficient to defeat defendant's claim.

Further, had Howard's endorsement appeared on the check, the plaintiff would have had notice that the money had not been paid to Sumner directly and the case might have called upon it to scrutinize the drawer's signature with more care. Therefore, defendant's endorser by its conduct concealed from the plaintiff facts which it knew and which were calculated to have affected materially the plaintiff's conduct had they been known to it, and gave to it evidence that the Sumner signature was genuine. Under these circumstances the remarks of the Court in *Danvers Bank* v. *Salem Bank*, 151 Mass., 280, 283, in which the facts were quite similar to those of the case at bar, are strikingly applicable that:

> To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed

> upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which, from his implied assertion in presenting the check as a sufficient voucher, the drawee had a right to believe he had taken.

To the same effect are *Ford & Co.* v. *Bank*, 74 S. C. 180; *Peoples Bank* v. *Franklin Bank*, 88 Tenn. 299; *Greenwald* v. *Ford*, 21 S. D. 28; *McCall* v. *Corning*, 3 La. Ann. 409; *Farmers National Bank* v. *Farmers & Traders Bank*, 159 Ky. 141; *Canadian Bank of Commerce* v. *Bingham*, 30 Wash. 484; *National Bank of N. A.* v. *Bangs*, 106 Mass. 441; *Williamsburgh Trust Co.* v. *Tum Suden*, 120 App. Div. 518; *Ronvant* v. *San Antonio National Bank*, 63 Tex. 610.

The general rule that money paid under a mistake of fact may be recovered, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, has been modified in the class of cases under consideration only to the extent that where the mistake is that of a drawee in failing to discover the forgery of his drawer's signature, he can not recover where the person receiving the money has been free from negligence, or affirmative action, contributing to the success of the deception.

The reason assigned for the exceptional rule is that the drawee is bound to know the signature of one who draws upon him. Since he is supposed to have the

means of detecting a forgery his failure to do so is regarded as negligence as a matter of law. This rule was first laid down before the doctrine became established that one who pays money under a mistake of fact may recover it though he was negligent in not knowing the facts if the payee has not changed his position to his prejudice in reliance on the payment. Its survival in spite of the growth of the latter principle is an anomaly. It has been subjected to severe criticism, its operation has been regarded as harsh, and the tendency of the courts is to confine it within narrow limits. It is held that the rule applies only where the holder is himself entirely free from fault and slight circumstances have been laid hold of to show negligence on his part so as to take the case out of the operation of the exceptional rule.

Thus it has been held that where the holder of a check has paid it to the person presenting it out of the ordinary course of business, or where the person presenting it was a stranger and the holder did not require him to be identified or where for some other reason the circumstances under which it was presented should have aroused the holder's suspicion and he failed to make inquiry as to the right of the person presenting it to receive payment, the drawee may recover from the holder of the check the amount paid upon it. *Farmers' National Bank* v. *Farmers' & Traders' Bank,* 159 Ky. 141; *Ellis* v. *Trust Company,* 4 Oh. St. 628; *First National Bank* v. *State Bank,* 22 Neb. 769; *Danvers Bank* v. *Salem Bank,* 151 Mass. 280; *Peoples Bank*

v. *Franklin Bank*, 88 Tenn. 299; *Woods* v. *Colony Bank*, 114 Ga. 683; *Newberry Bank* v. *Bank of Columbia*, 91 S. C. 294; *Canadian Bank of Commerce* v. *Bingham*, 30 Wash. 484; *Greenwald* v. *Ford*, 21 S. D. 28; *Ronvant* v. *San Antonio Nat. Bank*, 63 Tex. 610.

In the case of this check, payable by its terms to the drawer, which was presented for negotiation before acceptance or certification, a proposing endorsee and purchaser was called upon to ascertain the genuineness of his endorser. A subsequent transfer thereof by general endorsement would guarantee that the paper had been transferred by a proper and valid endorsement and he would be bound by his guaranty thereof. Especially is this so where, as in this case, the endorsements are expressly guaranteed. As endorser and drawer were one, that of necessity asserted the genuineness of the drawer.

The Chase National Bank paid the check, not in reliance upon anything done or omitted to be done by the drawee, but before plaintiff had paid the check. It acted on the Howard National Bank's conduct and endorsement and possessed only its rights. That bank acted solely in reliance on Howard's honesty, with full knowledge of facts which should have aroused its suspicions as to Howard's right to receive the money and without any investigation. Through its negligence in not requiring Howard to endorse the check, and by its endorsement, it concealed from the plaintiff facts within its knowledge calculated to arouse plaintiff's suspicions had it known them; while by guaranteeing Sumner's

signature as endorser it represented his signature as drawer to be valid. It now seeks to shift the consequences of its conduct to the plaintiff. It does this on the sole ground that plaintiff did not discover, immediately upon presentation, a forgery so clever that it escaped detection by a bank which must have known Sumner's signature and was familiar with all the circumstances.

To permit the shifting of this loss would be contrary to one of the most elementary principles of justice, that, as between two innocent parties, the loss should fall upon the one who by his confidence in the wrongdoer made the injury possible, or as the rule is sometimes stated, the loss should fall on the one whose act occasioned the injury.

It is not denied that the Chase National Bank is entirely protected by the Howard National Bank endorsement.

II.

The doctrine that a check payable to a fictitious person is payable to bearer is inapplicable.

The defendant has argued that since Howard, who drew the check, did not intend Sumner to have any interest in it, it was payable to a fictitious person, and, therefore, payable to bearer. Consequently the endorsement was not necessary to transfer title and did not guarantee Sumner's signature as endorser, and, therefore, the plaintiff could not rely upon it as evidence of the genuineness of Sumner's signature as drawer.

Assuming that a check may be regarded as payable to a fictitious person as against one who did not know that the nominal payee was intended to have no interest in it, an assumption whose unsoundness will be next demonstrated, the strength of plaintiff's argument is not affected thereby. That argument is that the plaintiff's responsibility to previous holders as to ascertaining the genuineness of Sumner's signature as drawer and promptly detecting any forgery was changed by the Bank's guaranty of his indorsement; that but for such guaranty and conduct it might have detected the forgery before paying the check. Defendant's correspondent having, before plaintiff ever saw said draft, by its negligence given the check a deceptive endorsement of genuineness, which was acted upon by plaintiff to its injury, the defendant cannot be heard to say that the plaintiff is estopped from setting up the payment of said draft under a mistake of fact and from recovering the sum so paid.

III.

The defendant is liable to the plaintiff as guarantor of the endorsements of the check.

It will not be disputed that the drawee of a check does not, by paying it, admit the genuineness of the endorsements nor that the person presenting it does by that very act guarantee their genuineness. *Leather Manufacturers Bank* v. *Merchants Bank*, 128 U. S. 26. Admittedly Sumner's endorsement was a forgery. The defendant is then in the position of one who has received payment of a valid negotiable instrument which he had obtained through a forged

endorsement. Indisputably he must return to the drawee what he has received on that check.

Defendant seeks to avoid this consequence by contending that the check was payable to bearer. It says that Howard, who drew the check, did not intend Sumner to have any interest in it; that it follows that the payee was fictitious and the check payable to bearer; therefore title passed by mere delivery and the defendant got good title to it even though the nominal payee's endorsement was forged; the endorsement being immaterial, defendant is not liable as guarantor of it.

The language of this check forbids it being considered as a check payable to bearer. It is a check made expressly payable to the order of the drawer just as much as if it were payable "to the order of myself." The claim that the payee is fictitious equally asserts that the drawer (the same entity) is fictitious. The defendant can not insist that the drawer is not a fictitious person, and that the plaintiff is estopped from so claiming and at the same time insist that he can treat the payee, who is stated in the instrument to be the same person, as a fictitious person, so as to claim that the endorsement of such payee and his guaranty thereof can be disregarded and the paper be considered as passing by delivery, and the defendant be relieved from all responsibility for his own conduct. It follows that if the defendant's contentions prevail on the first point and Sumner must be regarded as the drawer of the check,

the same person as payee of this check can not be considered as a fictitious person and the check can not be regarded as payable to bearer.

According to the common law of England and this country alike an instrument is payable to bearer only when it is payable to a payee *known by the person against whom it is sought to be enforced* to be fictitious or non-existing, and therefore is not intended by such person to have any interest in it. *First National Bank* v. *Northwestern Bank*, 152 Ill. 296; *Bank of England* v. *Vagliano Bros.*, 1891 A. C. 107; *Armstrong* v. *National Bank*, 46 Ohio St. 512; *Shipman* v. *Bank of the State of New York*, 126 N. Y. 318; *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26; *Boles* v. *Harding*, 201 Mass. 103; *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397; *McCall* v. *Corning*, 3 La. Ann. 409.

The English Bills of Exchange Act of 1882, which provided that where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer, was construed by the House of Lords in the case of *Bank of England* v. *Vagliano Bros.* 1891 A. C. 107, as changing the law as it had existed theretofore. The decision of the Court of Appeal was reversed on that ground and it was held that the question whether a bill is payable to a fictitious payee depends upon the actual fact rather than upon knowledge on the part of the person to be charged.

In the case at bar the court below sustained defendant's contention that the check was payable to bearer on the authority of the Vagliano case. That

decision was clearly erroneous. The American Negotiable Instruments Law provides that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable.*" The words of the above quotation in italics were not contained in the English Act, and show clearly that this provision was intended merely as declaratory of the common law and not as a change of it. *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26; *Boles* v. *Harding*, 201 Mass. 103; *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397; *United Workmen* v. *Bank*, 101 Kans. 369. Therefore whether this case be regarded as arising at common law or under the Negotiable Instruments Law, the Vagliano case is not applicable.

In each of the above cases the drawer was induced by fraud to make a check payable to a person who was not intended by the person who perpetrated the fraud, and who afterwards forged the payee's name, to have any interest in it. It was held that the check was not payable to bearer because the drawer did not know that the nominal payee was not intended to have an interest in it. Much more reason is there for holding that a check is not payable to bearer when the putative drawer never signed the check at all. To hold otherwise would be to say that whether or not a negotiable instrument is payable to a fictitious person depends upon the intention of one who is not a party to it and who has no authority to bind any party to it. Such a radical departure from the com-

mon law could not have been intended by the above provision of the Negotiable Instruments Law.

The authorities relied upon by the defendant are cases in which the drawer's signature was affixed to a check by an agent who was held out to the drawee as having an unlimited authority to draw checks on behalf of the drawer. It was held that under these circumstances the principal was chargeable with the knowledge of his agent that the check was payable to a fictitious person. But in the case at bar Howard was the only one who knew that the nominal payee was not intended to have any interest in the check. Since he had no authority to draw checks on behalf of either Sumner or the plaintiff, his knowledge cannot be imputed to either of them. *United States* v. *National Bank of Commerce*, 205 Fed. 433, 438.

That the check was not payable to bearer is also apparent for another reason. R. S., Sec. 3620, provides that—

> It shall be the duty of every disbursing officer having any public money entrusted to him for disbursement to * * * draw for the same *only in favor of the person to whom payment is made.*

Lieut. Sumner was a disbursing officer within the meaning of this statute and was clearly forbidden by it to draw a check payable to bearer. The Bank was chargeable with this limitation upon his authority and could acquire no rights against the Government by cashing a check payable to bearer.

In the Floyd Acceptances, 7 Wall. 666, this Court said (676):

> Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government.

If this check is to be regarded as payable to bearer the plaintiff, having paid it in ignorance of that fact, can recover the amount of it from the defendant on the ground that it paid a void instrument in ignorance of a fact which made it void. If it was not payable to bearer Sumner's endorsement was necessary to pass title to the defendant and plaintiff can recover on the guaranty. This was the result reached by the Circuit Court of Appeals for the Ninth Circuit in a case arising under very similar circumstances. *United States* v. *National Bank of Commerce*, 205 Fed. 433; 224 Fed. 679.

IV.

The plaintiff is not barred from recovery in this case by negligence in failing sooner to discover and notify the bank of the forgery.

The defendant contended below, and it is presumed that it will do so in this Court, that it was prejudiced by plaintiff's failure sooner to discover and notify the bank of the forgery; that had plaintiff acted with reasonable diligence it could have dis-

covered the forgery on the 17th or 18th of December, and Howard would then have been arrested before he had had an opportunity to dispose of the proceeds of his fraud; that owing to plaintiff's negligence the forgery was not discovered for over two weeks. More than three weeks had elapsed when Howard was arrested, and meanwhile he had spent all but $1,466 of the proceeds of the check. Such negligence, says the defendant, defeats plaintiff's right to recover in this case.

This contention is clearly unsound. The plaintiff was not negligent in paying the check on December 18th, for it is undisputed in the record that the forgery was so well done that it could not be detected by mere inspection of the drawer's handwriting, and the negligence of the plaintiff, if any, in paying the check could in no case avail the defendant, for neither the Bank nor the defendant paid out any money in reliance on the fact of payment. They had both paid the check before the plaintiff paid it. The defendant is no worse off than it would have been had the plaintiff delayed paying the check for two weeks pending an investigation of the genuineness of the drawer's signature. Had the plaintiff done this, the defendant would have had no cause of complaint, though the plaintiff had ultimately refused to pay the check. To hold otherwise would be to declare that the United States must at its peril determine on presentation the genuineness of every check drawn on it, and that any appreciable delay in doing so is negli-

gence regardless of whether such determination can as a matter of fact be made sooner.

The discovery of the forgery came about through the fact that the plaintiff on or about December 24th discovered that Sumner's account had been overdrawn and wrote to Sumner asking for an explanation. As the result of further correspondence, Sumner discovered the forgery and gave notice of it to the Bank on December 31, 1914. In the absence of evidence to the contrary, it may be presumed that the plaintiff demanded of Sumner an explanation of the overdraft as soon as it was discovered. When it is remembered that the Treasurer of the United States keeps accounts with 6000 disbursing agents whose identity is constantly changing, and that there are 800 active designated depositary banks through which checks on the Treasurer may be cashed, it is not surprising that with the vast amount of bookkeeping which the keeping of these accounts entails it sometimes takes a week to discover an overdraft on the part of one of these thousands of disbursing agents. Certainly this Court cannot say that the failure to discover the overdraft for a week was negligence as a matter of law, nor is there anything in the record to show that the Treasurer was negligent in not inquiring as to the cause of the overdraft by telegraph instead of by mail. There is, therefore, no evidence to show that the plaintiff was guilty of negligence in failing sooner to discover the overdraft or that it had not proceeded with reasonable diligence after the discovery of that fact.

But even if the plaintiff was negligent in not sooner discovering the forgery and notifying the Bank of it, that would not avail the defendant, for the reason that the Bank was itself negligent in cashing the draft for Howard under suspicious circumstances without inquiring into his right to receive the money.

The case principally relied upon to sustain defendant's contention is *Leather Manufacturers Bank* v. *Morgan*, 117 U. S. 96. In that case a depositor in the defendant bank brought an action against it to recover money paid by it on plaintiff's checks which had been forged by raising the amounts thereof. It was held that where a bank renders to a depositor a statement of his account it is the duty of the depositor to examine such statement and promptly notify the bank of errors therein, if any, in order that it may correct them, and, if necessary, take steps for its protection by compelling restitution by the forger; that his failure to do so constituted negligence; that if he had exercised reasonable care he would have discovered the forgeries, and that since his failure to discover and give notice of them to the bank was the cause of the latter's loss, he could not recover from it the money paid out by it on the forged checks. It was held, furthermore, that it was not necessary that it should appear by evidence that a benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. The court said, (p. 115) that

> As the right to seek and compel restoration and payment from the person committing the

> forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly and it may be effectively exercising it.

But in the same case the Court says (p. 112):

> Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account.

and the Court, at page 118, quotes with approval from *Frank* v. *Chemical National Bank*, 84 N. Y. 209, as follows:

> But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank to so conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally, and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which, in the first instance, is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks it commits the first fault. It cannot visit the consequences upon the innocent depositor who, after the fact, is also deceived by the simulated paper.

All the authorities which lay down the rule that it is the duty of a depositor to exercise reasonable

diligence to discover forgeries of his checks and that if the bank suffers a loss because of his negligence in failing to promptly discover and notify the bank of forgeries, the depositor can not recover money paid out upon forged checks, recognize that where the bank has itself been guilty of any acts of negligence in paying a forged check it can not receive a credit for the amount of the check. *New York Produce Exchange Bank* v. *Houston*, 169 Fed. 785, 788; *Merchants National Bank* v. *Nichols & Co.*, 223 Ill. 41, 52; *National Dredging Co.* v. *Farmers Bank*, 6 Penn. (Del.), 580, 590; *Brixen* v. *National Bank*, 5 Utah, 504; *United States* v. *National Bank of Commerce*, 205 Fed. 433, 436; *Danvers Bank* v. *Salem Bank*, 151 Mass. 280.

In the latter case a bank which had paid a forged check drawn upon it brought an action to recover of the bank presenting the check for payment the amount so paid. The defendant claimed that the plaintiff could not recover because of its negligence in not having sooner discovered the forgery and notified the defendant thereof. In disposing of this contention the court said (p. 284):

> Even if the fact that the check, when paid, reduced the amount of the deposit below that which the depositor, as it was understood between him and the plaintiff, was to keep, or if any other circumstances should have called the attention of the plaintiff to the forgery, the original fault was still that of the defendant in paying the check without proper investigation.

The plaintiff acted with entire promptitude when the forgery was discovered, and no negligence on its part has prejudiced the defendant. When the check was forwarded for redemption, it was entirely natural that the plaintiff should have been misled, and induced to allow the same in settlement without the scrutiny it would have exercised had not the defendant given currency thereto.

CONCLUSION.

For the above reasons the judgment of the Circuit Court of Appeals should be reversed and judgment entered for the appellant.

Respectfully submitted.

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JANUARY, 1920.

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No. 134.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

AGAINST

THE CHASE NATIONAL BANK,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF AND ARGUMENT FOR DEFENDANT-IN-ERROR

HENRY ROOT STERN,
Counsel for Defendant-in-Error.

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STATEMENT OF THE CASE

The following omissions from and corrections of the statement of the case set forth in the brief of the plaintiff-in-error (hereinafter called the plaintiff) are, we believe, of sufficient importance to require specific mention.

The reference by plaintiff's counsel (pp. 2, 7 of his brief) to the circumstance that at the particular time in question Lieutenant Sumner was not in fact performing the duties

of quartermaster at Fort Ethan Allen is wholly without importance and his statement that the Howard National Bank knew such fact (p. 2, 7 of his brief) is not supported by the record. Lieutenant Sumner *had* been performing such duties and there is no evidence that the Howard National Bank knew of any change in that respect; the plaintiff's Treasurer did not reject the instrument or seek to reclaim the proceeds on any such ground; Sumner drew similar checks or drafts not only a short time before, but also a short time after the forgery (Transcript of Record, pp. 16-17, fols. 30-32); and finally he was authorized to draw, and it was *at that time* the *duty* of the plaintiff's Treasurer to honor such checks or drafts drawn by him (*id.*, p. 16, fol. 30).

The mere statement that First-Class Sergeant Howard was a finance clerk in the office of the quartermaster is scarcely a complete description, nor does it disclose the knowledge of him possessed by the Howard National Bank. He was one of six men who had been especially trained for such a position by the Government (*id.*, p. 21, fols. 34-35). He handled all monetary papers at the Post and acted as pay clerk to Lieutenant Sumner, and the *Howard National Bank knew him as such clerk* (*id.*, p. 21, fol. 35). When he presented the instrument in question, the Howard National Bank, knowing him to be a pay clerk of the Government and an assistant of Lieutenant Sumner (*id.*, p. 21, fol. 35), cashed it in entire good faith, paying him the full face amount thereof (*id.*, p. 21, fol. 35).

On the same day, it forwarded the instrument by mail to the defendant-in-error (hereinafter called the defendant), The Chase National Bank of New York, for collection and for deposit to its account, at the same time stamping the back with the customary indorsement (*id.*, pp. 19-20, 21, fols. 33-34, 36). It was received the next day in the usual course of business by the defendant, with which both the Howard National Bank and the Government at that

time maintained deposit accounts (*id.*, pp. 21-22, fols. 35-36). The Chase National Bank likewise acted in perfect good faith, not knowing or having any reason even to suspect that the instrument was not a genuine draft, or check, and exactly what it purported to be (*id.*, p. 23, fol. 39). On the day of its receipt, it credited the amount of the instrument to the account of the Howard National Bank, to which it gave due notice thereof (*id.*, p. 22, fol. 37)., and, at the same time, pursuant to an arrangement between it and the Government, of whose funds it was a depositary (*id.*, pp. 26-33, fols. 45-58; p. 34, fol. 60), it charged the amount thereof against the account of the plaintiff (*id.*, pp. 21-22, fol. 36), stamped the usual anticipatory receipt of payment on the back of the draft or check, as appears from the copy annexed to the stipulation of facts (*id.*, p. 20) and promptly on the same day mailed it, with a notice showing how it had been charged to the plaintiff's account, to the plaintiff's general disbursing officer, the Treasurer of the United States, at the City of Washington (*id.*, p. 22, fol. 36). Under the arrangement between the plaintiff and the defendant, the latter cashed the instrument mentioned under the same conditions and with the same rights and responsibilities as it cashed commercial checks drawn on other banks (*id.*, pp. 36-37, fols. 64-65). The Chase National Bank had asked the plaintiff whether the items forwarded by it would be promptly examined upon arrival in the City of Washington and any irregular checks returned the same day, stating that the matter was quite important to it in its relations with its correspondent banks, and also requested to be advised by wire of the non-payment, for any reason, of any check for $500 or upwards, and of the name of the last endorser (*id.*, p. 37, fols. 66-67). Evidently the purpose of this was to enable The Chase National Bank and its correspondents to take prompt steps for their own protection, in the event that any such instruments should prove to be forged or otherwise irregular. The plaintiff acknowledged the receipt of the request for advice by wire

of the rejection of any check for $500 or upwards, and stated that it was intended that the work of examining checks in the Treasurer's office should be so conducted that in case a check should be rejected, the bank from which it was received should be notified *not later* than the next day after its receipt (*id.*, p. 38, fols. 67-68). There was no further correspondence on the subject and it is evident that as a result of this correspondence the defendant was satisfied that the plaintiff would promptly and carefully examine all instruments such as that involved in this case and give *prompt* notice of any irregularities therein. The instrument in question was received in due course by the plaintiff on December 17, 1914 (*id.*, p. 22, fols. 36-37). The next day, December 18, 1914, after the plaintiff's Treasurer had had twenty-four hours in which to examine it, it was paid by crediting the amount to the defendant (*id.*, p. 22, fol. 37), after having been *actually examined* and passed as genuine (*id.*, p. 40, fols. 72-73), *although such payment caused Lieutenant Sumner's account with the Treasurer of the United States to be overdrawn* (*id.*, p. 23, fols. 38-39). *About a week later* the officials of the plaintiff's Treasury Department notified Lieutenant Sumner that his account was overdrawn and requested an explanation (*id.*, p. 23, fol. 39). *Five days later,* December 29, 1914, they telegraphed him to expedite the matter (*id.*, p. 23, fol. 39). *Thereafter*, he examined his papers and discovered that the instrument mentioned had been forged and so notified the Howard National Bank on December 31, 1914 (*id.*, p. 23, fol. 39). The Howard National Bank wrote the defendant a letter on the same day, notifying it of the forgery and the letter was received by the defendant on January 2, 1915 (January 1, 1915, having been a holiday in New York). (*id.*, p. 23, fols. 39-40; p. 39, fols. 70-71). Before receiving such notice, however, the defendant had paid the Howard National Bank and charged to its account various sums of money in excess of the amount to the credit of said bank with the defendant either at the time or immediately after

the time the defendant credited the amount of said check to said bank. (*id.*, p. 22, fol. 37). *On the same day* it learned of the forgery, January 2, 1915, defendant wrote to the plaintiff advising it thereof (*id.*, p. 23, fol. 40; p. 40, fol. 71). The plaintiff received such letter on January 4, 1915 (January 3, 1915, being a Sunday), and replied thereto on January 4, 1915, by a letter which defendant received on January 5, 1915, (*id.*, pp. 23-24; fol. 40; p. 40, fols. 72-73). In the last mentioned letter, *which contained the first word from the plaintiff to the defendant in connection with the forgery,* the plaintiff sent a photographic copy of the check to the defendant, directing the defendant to credit it with the amount of the instrument and forward the photographic copy to the Howard National Bank for reclamation. The defendant attempted to obtain the money back on the check from the Howard National Bank, but it refused to return it or to accept any of the responsibility (*id.*, p. 41, fols. 73-74). It is to be noted that, while the defendant and the Howard National Bank made the necessary book entries in respect to said instrument and forwarded it with proper instructions on the *very day* of its receipt in each instance and gave notice of any information in respect thereto on the *very day* of its receipt, the plaintiff, until after January 3, 1915, never did anything in connection with the matter without delay, although it had led the defendant to believe, as heretofore mentioned, that the examination of such instruments would be so conducted that, in case one should be rejected, the bank from which it was received would be notified *not later than* the next day after its receipt (*id.*, p. 38, fols. 67-68). If it had carefully examined the instrument and discovered the forgery and given due notice by wire on the *very day* of its receipt, December 17, 1914, as any *bank* surely would have done, the forger, it must be presumed, would have been apprehended that day in Burlington with the proceeds of the draft on his person for he did not leave Burlington till that night, the night of December 17, 1914 (*id.*, p. 44, fol. 79). Even thereafter he was traveling

around in the United States for about two weeks (*id.*, p. 44, fols. 80-81), presumably spending the money obtained on the forged instrument, and undoubtedly could have been apprehended at almost any time during that period with a very substantial portion of the proceeds on his person. Although he left the United States on January 1, 1915 (*id.*, p. 44, fol. 81), he was arrested in Winnipeg, Manitoba, on January 6, 1915 (*id.*, p. 44 fol. 81), just four days after the defendant first heard of the forgery (*id.*, p. 23, fol. 39), on information supplied, not by the plaintiff's secret service men, but by detectives employed by the American Bankers Association, of which the Howard National Bank was a member (*id.*, p. 44, fol. 81), and even at that late date there was recovered from him the sum of $1,466, the unspent portion of the proceeds of this fraud, and that sum was turned over to the plaintiff, the United States Government (*id.*, p. 44, fol. 81).

BRIEF OF THE ARGUMENT

We present the following points:

(1) A. THE DRAWEE OF A CHECK OR DRAFT IS BOUND, AT HIS PERIL, TO KNOW THE DRAWER'S SIGNATURE AND CANNOT, AFTER PAYMENT OF SUCH CHECK TO AN INNOCENT HOLDER FOR VALUE, RECOVER BACK THE AMOUNT OF SUCH PAYMENT FROM THE LATTER.

Price v. *Neal*, 3 Burr., 1354;
United States v. *Bank of Georgia*, 10 Wheat., 333;
United States v. *Bank of New York*, 219 Fed., 648;
National Park Bank v. *Ninth National Bank*, 46 N. Y., 777;
Bank of St. Albans v. *Farmers' & Mechanics' Bank*, 10 Vt., 141;
First National Bank of Belmont v. *First National Bank of Barnesville*, 58 Ohio State, 207;
State National Bank v. *Magdalena*, 157 Pac., 498 (N. Mex.);
Bergstrom v. *Ritz-Carlton Restaurant & Hotel Co.*, 171 N. Y. Ap. Div., 776;

Germania Bank v. *Boutell*, 60 Minn., 189;
Ames, 4 *Harvard Law Review*, 275.

B. THIS IS EQUALLY TRUE, EVEN THOUGH THE ENDORSEMENT OF THE PURPORTED PAYEE ALSO IS FORGED.

Postal Telegraph-Cable Co. v. *Citizens' Nat'l Bank*, 228 Fed., 601 (C. C. A., 3d Ct.);
State Bank v. *Cumberland Savings Bank*, 168 N. C., 605;
Deposit Bank of Georgetown v. *Fayette Nat'l Bank*, 90 Ky., 10;
First National Bank v. *Marshalltown State Bank*, 107 Ia., 327;
Howard & Preston v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann., 727;
Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;
National Park Bank v. *Ninth National Bank*, 46 N. Y., 77;
National Bank of Commerce v. *United States*, 224 Fed., 679; s. c., 205 Fed., 433;
2 *Parsons on Notes and Bills*, 591;
Robinson v. *Yarrow*, 7 Taunt., 455;
Cooper v. *Meyer*, 10 B. & C., 468;
Beeman v. *Duck*, 11 M. & W., 251;
Williams v. *Drexel*, 14 Md., 566.

(2) INASMUCH AS THE INDIVIDUAL DRAWING THE INSTRUMENT DID NOT INTEND THAT THE PERSON NAMED AS PAYEE THEREIN SHOULD HAVE ANY INTEREST IN IT OR EVEN POSSESSION THEREOF, SUCH PAYEE WAS, WITHIN THE NEGOTIABLE INSTRUMENTS LAW, A "FICTITIOUS" PAYEE, AND HENCE THE INSTRUMENT WAS PAYABLE TO BEARER, AND THE INDORSEMENT SURPLUSAGE.

Transcript of Record, p. 23;
Uniform Negotiable Instruments Law, §9;
Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;
Trust Company of America v. *Hamilton Bank*, 127 N. Y. App. Div., 515;

Snyder v. *Corn Exchange Bank*, 221 Pa. St., 599;
Bartlett v. *First National Bank*, 247 Ill., 490;
Phillips v. *Mercantile National Bank*, 140 N. Y., 556;
Clutton v. *Attenborough & Sons*, L. R. (1897) App. Cases, 90;
Coggill v. *American Exchange National Bank*, 1 N. Y., 113;
Phillips v. *Thurn*, 18 C. B. (18 J. Scott, N. S.), 694;
Kohn v. *Watkins*, 26 Kans., 691;
Ort v. *Fowler*, 31 Kans., 478;
Lane v. *Krekle*, 22 Ia., 404, 405;
Farnsworth v. *Drake*, 11 Ind., 101;
Blodgett v. *Jackson*, 40 N. H., 21;
Re Assignment of Pendleton Hardware Co., 24 Oregon, 330.

(3) THE RECORD FAILS TO DISCLOSE ANY FACTS SUFFICIENT TO JUSTIFY A FINDING THAT THE HOWARD NATIONAL BANK WAS NEGLIGENT.

Dedham National Bank v. *Everett National Bank*, 177 Mass., 392.

(4) BOTH PARTIES HAVING MOVED FOR THE DIRECTION OF A VERDICT, THE EXCEPTION TO THE FINDING OF THE TRIAL JUDGE IN FAVOR OF THE DEFENDANT DOES NOT PERMIT THE PLAINTIFF TO RAISE THE QUESTION OF THE NEGLIGENCE OF THE HOWARD NATIONAL BANK FOR REVIEW BY THIS COURT UPON WRIT OF ERROR.

Transcript of Record, p. 45, fol. 82;
Wigmore on Evidence, Vol. IV., §2552 (c), p. 3593;
Beuttell v. *Magone*, 157 U. S., 154;
Williams v. *Vreeland*, 250 U. S., 295;
Sena v. *American Turquoise Co.*, 220 U. S., 497;
Bowen v. *Chase*, 98 U. S., 254;
Martinton v. *Fairbanks*, 112 U. S., 670;
Kentucky Life & Accident Insurance Co. v. *Hamilton*, 63 Fed., 93;
Wilson v. *Merchants' Loan & Trust Co.*, 183 U. S., 121;

Lehnen v. *Dickson,* 148 U. S., 71;
Otoe County v. *Baldwin,* 111 U. S., 1, 12;
Basset v. *United States,* 9 Wall., 38, 40;
Dooley v. *Pease,* 180 U. S., 126, 131;
Hepburn v. *Dubois,* 12 Peters, 345

(5) EVEN ASSUMING THAT THE HOWARD NATIONAL BANK WAS NEGLIGENT IN CASHING THE CHECK, SUCH NEGLIGENCE COULD NOT BE CHARGED TO THE DEFENDANT BANK, WHICH WAS A BONA FIDE PURCHASER FOR VALUE.

Transcript of Record, p. 22, fol. 37;
Merchants National Bank v. *Santa Maria Sugar Co.,* 162 N. Y. App. Div., 248;
National Park Bank v. *Seaboard Bank,* 114 N. Y., 28;
Rickerson Roller-Mill Co. v. *Farrell Foundry & Machine* Co., 75 Fed., 554;
National Park Bank v. *Ninth National Bank,* 46 N. Y., 77;
Jones v. *Miners, etc., Bank,* 144 Mo. App., 428.; 128 S. W., 829;
Pennington County Bank v. *Moorehead First State Bank,* 110 Minn., 263;
Raphael v. *Bank of England,* 17 C. B., 161;
United States v. *Bank of New York,* 219 Fed., 648.

(6) THE STIPULATED FACTS SET FORTH IN THE RECORD ESTABLISH SUCH NEGLIGENCE ON THE PART OF THE PLAINTIFF AS WILL, IRRESPECTIVE OF ANY OTHER QUESTION IN THIS CASE, PRECLUDE ITS RIGHT TO RECOVERY. THE GENERAL VERDICT DIRECTED IN FAVOR OF THE DEFENDANT NECESSARILY CONSTITUTED A FINDING OF SUCH NEGLIGENCE WHICH THIS COURT WILL NOT DISTURB UPON WRIT OF ERROR.

Transcript of Record, p. 16-24, 43-45, fols. 30-40, 79-81;
Leather Manufacturers' Bank v. *Morgan,* 117 U. S., 96, 115;
Marks v. *Anchor Savings Bank,* 252 Pa., 304, 310;
Gloucester Bank v. *Salem Bank,* 17 Mass., 32;

United States v. *Central National Bank*, 6 Fed., 134;
Salas v. *United States*, 234 Fed., 842;
United States v. *Bank of New York*, 219 Fed., 648, 649.

POINT I.

A. The drawee of a check or draft is bound, at his peril, to know the drawer's signature and cannot, after payment of such check to an innocent holder for value, recover back the amount of such payment from the latter.

B. This is equally true, even though the endorsement of the purported payee also is forged.

A.

The general rule on this subject was established by Lord Mansfield, in the case of *Price* v. *Neal*, 3 *Burr.*, 1354. That case involved two forged bills of exchange which had been paid by the drawee. One of these bills had been paid, when it became due, without acceptance; the other was duly accepted and paid at maturity. Upon discovery of the forgery, the drawee brought an action against the holder to recover back the money so paid; both parties being admitted to be equally innocent. It was held that the drawee could not recover. Lord Mansfield said:

> "Here was *no fraud; no wrong.* It was incumbent upon the *plaintiff*, to be satisfied 'that the bill drawn upon him *was the drawer's hand,*' before he accepted or paid it; but it was not incumbent upon the *defendant* to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts, after which acceptance the defendant innocently and *bona fide* discounts it.

> The plaintiff lies by, for a considerable time after he has paid these bills; and *then* found out 'that they were forged,' and the forger comes to be hanged. He made no objection to them at the *time* of paying them. Whatever neglect there was, was on *his* side.

The report of the case indicates strongly that the endorsements were also forged. Judge Learned Hand so analyzed it, saying (Transcript of Record, p. 14, fol. 25):

> "Indeed, from the report in Burrows it seems likely that in *Price* v. *Neal*, Lee, the forger, forged the *endorsements* along with the bill itself" (italics ours).

The principle of law established by the foregoing case has never been departed from by the courts of England, the Federal Courts, the courts of New York and the courts of the majority of the States of the Union, which not only regard it as authoritative, but expressly approve it in principle.

> *United States Bank* v. *Bank of Georgia*, 10 Wheat, 333;
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> *United States* v. *Bank of New York*, 219 Fed., 648;
> *National Park Bank* v. *Ninth National Bank*, 46 N. Y., 77;
>
> *First National Bank of Belmont* v. *First National Bank of Barnesville*, 58 Ohio State, 207;
>
> *State National Bank* v. *Magdalena*, 157 Pac., 498 (N. Mex.);
>
> *Bergstrom* v. *Ritz-Carlton Restaurant & Hotel Co.*, 171 N. Y. App. Div., 776.

The courts of Vermont, where the check in question was drawn and negotiated, have applied precisely the same rule on this subject as those of New York and the United States. In *Bank of St. Albans* v. *Farmers' & Mechanics' Bank*, 10 Vt., 141, it was held that where a bank innocently purchases and cashes a forged check, it cannot be

compelled to repay the drawee bank the amount of money so obtained by it from the latter. The Court said (p. 145):

> *"The presentment of a bill to the drawee is a direct appeal to him to sanction or repudiate it.* It is *an inquiry* as to its genuineness, *addressed to the party, who, of all men, is supposed best able to answer it,* and whose decision is most satisfactory. He is, moreover, the *person to whom the bill itself points, as the legitimate source of information to others,* and *if he were permitted to dishonor a bill after having once honored it, the very foundation of confidence in commercial paper would be shaken.* There is a wide difference between such a transaction and the passing of paper as a representative of money, between persons equally strangers to it in the ordinary course of business. In the latter case, the receiver relies, in a measure, upon the paper, while in the former, the case is reversed, and the *holder relies,* and *has a right to rely, upon the decision of him to whom the bill is addressed,* and who alone is to determine whether it shall be honored or not" (italics ours).

There has been some difference of opinion as to the reason which is the true basis of the principle established in *Price* v. *Neal.*

On the one hand it has been urged with force that the doctrine is founded upon strong reasons of commercial policy.

See case last cited, also *Germania Bank* v. *Boutell,* 60 Minn., 189, where the Court said (p. 192):

> "The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the

drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact."

On the other hand the late Dean of the Harvard Law School, in a very interesting and able article on this subject, has maintained that the doctrine of *Price* v. *Neal* is based upon the principle expressed in the maxim that where equities are equal the legal title shall prevail.

Ames "The Doctrine of Price v. *Neal,"* 4 Harvard Law Review, p. 297.

Whichever of the two reasons above referred to may be deemed to be the true one, it is clear that the legal consequence of the drawee's act in paying a check or draft upon which the maker's signature is forged is not dependent upon proof by the holder of negligence on the part of the drawee.

B.

The plaintiff does not dispute the principle laid down in *Price* v. *Neal* and the other authorities above cited, but contends that, because in the case at bar, the *endorsement* of the purported payee was forged as well as the signature of the purported drawer, the rule does not apply.

This contention necessarily proceeds upon the theory that the holder of a draft, payable to the order of a specific payee, in endorsing and presenting it for payment, represents either expressly or impliedly, that the prior endorsement of such payee is genuine.

Assuming the existence of such a representation, it does not absolve the drawee from his *primary* duty to repudiate the forgery of the drawer's signature.

In the following cases not only the signatures of the drawers but also the payees' endorsements were forged; yet the drawees, having paid the instruments to innocent holders for value, were not permitted, after discovery of the forgeries, to recover back from the holders.

Postal Telegraph-Cable Co. v. *Citizens' Nat'l Bank*, 228 Fed., 601 (C. C. A. 3d Ct.);

State Bank v. *Cumberland Savings Bank*, 168 N. C., 605;

Deposit Bank of Georgetown v. *Fayette Nat'l Bank*, 90 Ky., 10;

First National Bank v. *Marshalltown State Bank*, 107 Ia., 327;

Howard & Preston v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann., 727;

Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;

National Park Bank v. *Ninth National Bank*, 46 N. Y., 77.

We submit that the case first cited, *Postal Telegraph-Cable Co.* v. *Citizens' Nat'l Bank*, 228 Fed., 601, decided in 1916 by the Circuit Court of Appeals for the Third Circuit, is, upon its facts, almost on all fours with the present case.

The fundamental difficulty with our opponent's position is that, even when both the signatures of the drawer and the endorsement of the payee are forged, the drawee is really in no worse position than if the endorsement of the payee had been genuine, in which case plaintiff does not dispute that the doctrine of *Price* v. *Neal* would be a complete bar to recovery. Even if we assume, therefore, the existence of a representation on the part of the holder that the endorsement is genuine, such representation is immaterial. The drawee is not primarily concerned with the endorsements but merely with the signature of the drawer, because, as was said in *State Bank* v. *Cumberland Savings Bank, supra*: "The drawee bank pays a check upon the faith of the genuineness of the signature of the drawer." The forgery of the *endorsement* is not the producing or proximate cause of the loss. That results immediately upon, and solely from, the honoring by the drawee of a draft bearing the forged signature of his drawer.

Hence, Judge Learned Hand, in the District Court, properly concluded that (Transcript Record, p. 13, fols. 24-25):

> "As the bill was a forgery and created no obligation, it could not make the slightest difference to the drawee what endorsements it bore, or whether or not they were genuine. The bill being void could never be presented by the true owner, assuming the payee ever became its true owner. Now, in the case of a genuine bill stolen and forged, the wrong done the drawee who pays on the forged endorsement is only that he must pay again, a wrong which cannot arise when the bill is a forgery. Hence the forgery of the endorsement was wholly irrelevant even if the bill had been stolen from the actual payee."

It was strongly urged by the plaintiff in the Court below and is suggested at pages 8 and 9 of the plaintiff's brief in this Court, that the fact that the name of the ostensible drawer of the check was identical with that of the ostensible payee, and hence endorsee, in some way distinguishes the present case from those above cited in which the ostensible maker and payee purported to be different parties. In the plaintiff's present brief, for example, it urges that

> "The Treasurer could not believe that the Bank which cashed the check would endorse it and guarantee a prior endorsement without assuring itself that the signature guaranteed by it was genuine. (Plaintiff's brief, page 9).

Exactly the same argument might be and doubtless was advanced in the cases above cited in which the maker and payee purported to be *different* persons, although both names were written on the check by the hand of the same man, viz., the forger.

In any of such cases, had the endorsee Bank assured itself regarding the genuineness of the endorsement it

guaranteed, the forgery of the signature would have also been discovered and the check never presented for payment. Notwithstanding, however, its failure to so assure itself, and the fact that the endorsement was forged, the endorsee Bank was held not liable to refund to a drawee who paid upon a forged drawer's signature.

There is another reason why this argument is fallacious. It assumes that because the same name appeared upon the face and the back of the check they must necessarily have been written by the same hand. This happens to be true in this particular case, but the argument must be tested by its general and not by its particular application. *It does not follow that because the endorsement is a forgery, the signature on the face is likewise, or vice versa.* It might very well have been that Howard, after drawing up and forging Sumner's name to the check, could have procured the latter, on some pretext, to write his own name on the back of the instrument. Such cases are by no means uncommon. Why should the Treasurer be permitted to take it for granted that because the endorsement is, or is guaranteed to be, genuine, the signature on the face is equally so, merely because the handwriting appears similar? What right has he to indulge in or rely upon loose assumptions or vague inferences when he has precise, direct means of identification in his own possession?

> "The drawee of a bill is presumed to have a better knowledge of the signature of the drawer than the holder. It is for him to rely upon his own knowledge and means of information on the subject, and not upon presumptions arising from the opinions of others." *Howard & Preston* v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann., 727, 728.

In the last mentioned case, some of the drafts involved, like the check in the case at bar, were drawn to the order of the ostensible drawer and purported to be endorsed by him. It was there urged by the drawees, as it is here urged by the plaintiff, that they were "thrown off their guard by the natural inference that the (cashing) bank

had taken the drafts directly from the" ostensible drawer.

The root of the matter is that when a check or draft is presented to the drawee, he is not, as between himself and the holder, primarily concerned with the genuineness of any signature thereon except that of the drawer, appearing upon the face. The presentment of the instrument is in itself an inquiry directed solely to him as to the genuineness of such signature and only such signature.

Let us assume, in order to test the soundness of the plaintiff's contention, that the situation was reversed, and that a bill payable to the drawer's own order and purporting to be endorsed by him in the same handwriting is, before negotiation, presented to the drawee for acceptance. If the plaintiff's contention is sound, then, logically, the acceptance of the bill would constitute a representation not only that the signature on the face thereof is genuine, but also that the *endorsement* is genuine.

This, however, is not the law.

> "If the bill be made payable to the drawer's own order, and indorsed over by him, *acceptance admits the drawing, but does not admit the indorsement, though the name is the same, and they profess to be written by the same party.*" (Italics ours.)
>
> 2 *Parsons On Notes & Bills*, 591.

See also:

Robinson v. *Yarrow*, 7 Taunt. 455;

Cooper v. *Meyer*, 10 B. & C. 468;

Beeman v. *Duck*, 11 M. & W. 251;

Williams v. *Drexel*, 14 Md. 566.

In all of these cases the holder who purchased the bill after acceptance by the drawee, necessarily made the same argument that is advanced in the case at bar, namely, that the two signatures being in words identical and appearing to be in the same handwriting, and the drawee having means of verification of both signatures at hand, by his

acceptance necessarily represented that both were genuine. It was held by the Court, however, in each case, that the drawee need only consider, and his representation by acceptance only extended to the genuineness of the signature appearing on the *face* of the bill. *A fortiori,* the guarantee, by a holder, of the endorsement cannot be distorted into a representation as to the signature on the *face* of the bill; particularly where the holder cannot be presumed and the drawee *must* be presumed to have ready means of comparing the forged signature with the genuine signature of the ostensible drawer.

Furthermore, it must be borne in mind that from a legal standpoint, the check in the case at bar was not the check of a third party, but purported to be the check of the United States itself, upon itself. The plaintiff is a corporation sovereign and as such can only disburse its funds through and upon the orders of its officers and agents, duly appointed for that purpose. Sumner was a disbursing officer of the United States (Transcript Record, page 16). His check was the check of the United States, and from this standpoint the United States was the purported drawer. This was held in one of the cases chiefly relied upon by the plaintiff.

United States v. *National Bank of Commerce,* 205 Fed. 433, at page 438.

Therefore, when the check was presented for payment it was as if the holder had said to the plaintiff, "Is this your check?" The plaintiff's contention that, even under these circumstances and merely because the holder may have guaranteed the genuineness of the *endorsement,* it should be relieved from the consequences usually attendant upon the acceptance of the signature of another as one's own, is without justice or authority.

POINT II.

Inasmuch as the individual drawing the instrument did not intend that the person named as payee therein should have any interest in it or even possession thereof, such payee was, within the Negotiable Instruments Law, a "fictitious" payee, and hence the instrument was payable to bearer, and the indorsement surplusage.

In many instances where drawees have paid checks or drafts to which the signatures of the drawers were forged, and thereafter sought to recover back from the holders, the courts have reached the same conclusion as in the cases cited under Point I, but upon an alternative ground. These cases are based upon Section 9 of the Uniform Negotiable Instruments Law (in force, during the times herein mentioned, in Vermont, New York and the District of Columbia), which reads as follows:

> "The instrument is payable to bearer; * * *
> 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known *to the person making it so payable.*"

Of course, if the instrument in the case at bar had been expressly and in so many words made payable to bearer, no endorsement would have been necessary to the negotiation thereof, and under such circumstances we assume that our opponent would concede that the general rule laid down in *Price* v. *Neal* would apply.

If, however, as a result of the section of the statute above quoted the instrument was, in legal effect, exactly as if it had been expressly drawn payable to bearer, then the same result would necessarily follow. That we are correct in contending that upon the facts existing in this case the check here involved was, in legal effect, payable to bearer within the terms of Section 9 of said law, and that, in such event, the drawee has no recourse against

the holder after payment upon a forged signature of the drawer, was held below by the Circuit Court of Appeals and is established by the following authorities:

Bank of England v. *Vagliano Bros.*, L. R. (1891) App. Cases, 107;

Trust Company of America v. *Hamilton Bank*, 127 N. Y., App. Div., 515;

Snyder v. Corn Exchange Bank, 221 Pa. St., 599;

Bartlett v. *First National Bank*, 247 Ill., 490;

Phillips v. *Mercantile National Bank*, 140 N. Y., 556;

Clutton v. *Attenborough & Son*, L. R. (1897) App. Cases, 90;

Coggill v. *American Exchange National Bank*, 1 N. Y., 113;

Phillips v. *Thurn*, 18 C. B. (18 J. Scott, N. S.), 694;

Kohn v. *Watkins*, 26 Kans., 691;

Ort. v. *Fowler*, 31 Kans., 478;

Lane v. *Krekle*, 22 Ia., 404-5;

Farnsworth v. *Drake*, 11 Ind., 101;

Blodgett v. *Jackson*, 40 N. H., 21;

Re Assignment of Pendleton Hardware Company, 24 Oregon, 330.

The leading modern authority on this point is *Bank of England* v. *Vagliano Bros.* (*supra*), decided by the House of Lords in 1891. In view of the eminence of the tribunal and the elaborate nature of the opinions, we deem it allowable to digest the facts and quote from the opinion at some length.

The statute under construction in the Vagliano case was practically the same as Section 9 of the Negotiable Instruments Law, except that the latter Act provides that the instrument is payable to bearer when the fictitious character of the payee is "known to the person making it so payable" (in the case at bar, Sergeant Howard, the forger) and in that respect it is, if anything, more favorable to the contention of the defendant than the English

statute. In the case mentioned it appeared that Vagliano Brothers were foreign bankers, doing a large business in various parts of the world. One of their clerks, Glyka, forged a great number of bills of exchange, purporting to be drawn on the firm by one of its foreign correspondents, one Vucina, payable to another well-known firm, C. Petridi & Co. He also forged letters of advice to accompany them and caused them to be presented as genuine bills to Vagliano Brothers in the regular course of business. Vagliano Brothers, deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their general banker, to pay when presented. After bills had been accepted, Glyka would obtain possession of them, and endorse thereon the name of the payee and collect the money from the bank, which charged the amounts so paid to the account of Vagliano Brothers. The latter, on discovering the forgeries, sued the Bank to recover the amount so paid out on the forged bills. The House of Lords held, reversing the decision of the lower courts, that this amount could not be recovered. The decision is placed upon the ground that, since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills and never intended that it should, the payee was fictitious, and under the statute (Bills of Exchange Act, 1882, Section 7, Subdivision 3), providing that "Where the payee is a fictitious or nonexisting person the bill may be treated as payable to bearer," the bills of exchange were held to be, in legal effect, payable to bearer, and the Bank obtained good title regardless of the endorsements. Lord Halsbury said (p. 121):

> "It seems to me that what the Legislature was enacting was in substance this: That where a bill was not payable to bearer, the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument

with reasonable certainty; but where there was no real payee, the bill might be treated as payable to bearer. * * *

"If the substance of the matter be looked at, and it is remembered that what the Legislature was dealing with was what was to appear upon the face of the instrument and contemplated a case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing *would apply equally to a real person whose name was forged, as to a person who had no existence*" (italics ours).

Lord Watson, in the course of his opinion in the same case, said (p. 134):

"I think it right to state my own opinion with regard to the construction of Section 7, Subsection 3, of the Bills of Exchange Act, 1882. Upon that point, I concur in the reasoning of my noble and learned friend Lord Herschell. I think that the language of the subsection, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing or, *being in existence, has not and never was intended to have any right to its contents.* * * * The fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers contention that the bank was bound to deal with these documents on the same footing as if they had been real bills and ought not to have paid except upon genuine indorsations by C. Petridi & Co., (italics ours).

Lord Herschell, in the course of his opinion, said (p. 153):

"I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted

by way of pretence merely, *without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated* by a lawful holder as *payable to bearer*" (italics ours).

The *Vagliano* case is particularly strong, since the section of the Bills of Exchange Act therein construed contains substantially the same language as that of Section 9 of our Negotiable Instruments Law, to the effect that a negotiable instrument is payable to bearer when payable to the order of a fictitious or non-existing person, but does not contain the additional provision found in our law to the effect that the same is true when "such fact was known to the person making it so payable." Clearly the words quoted, as was pointed out in the case next discussed, strengthen the defendant's position and have just the contrary effect to that asserted by implication in the plaintiff's brief (p. 17 thereof). The fictitious character of the payee is not required to be known by the purported drawer, but by the "person" making the instrument so payable —in this case Sergeant Howard, the man who actually wrote and signed the check.

Both before and since the decision of the House of Lords in the *Vagliano* case, the courts of New York State followed the same line of reasoning. One of the most recent cases on the subject is

Trust Company of America v. *Hamilton Bank*, 127 *N. Y. App. Div.* (First Depart.), 515.

This case contains every material element which exists in the case at bar, except that the payee and the drawer did not purport to be the same individual, which difference only serves to make it a stronger authority for the defendant in the instant case. In the *Trust Company of America* case, the forger, who drew a check and forged the name of the party purporting to be the maker, made the same payable to an existing payee, but one not intended to have

any interest therein, and endorsed the name of such payee upon the back of the instrument. Thereafter, the instrument was negotiated and came into the hands of the defendant, which presented the check for payment to the plaintiff (the bank upon which it was drawn) guaranteeing the endorsements. The plaintiff paid the check and the Court held that the plaintiff could not recover back the amount thereof from the defendant. The Court, per McLaughlin, J., said (p. 518):

> "If all the endorsements on the checks in question had been genuine, the plaintiff could not recover, but if the maker's signature had been genuine and only the endorsements, or any of them, forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures are not genuine or recover on the ground that the same were forged, and by reason of that fact it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged endorsements of the payees, the plaintiff is entitled to recover. There are authorities to support this contention. (*First National Bank* v *Northwestern Bank*, 152 Ill., 296; *McCall* v. *Corning*, 3 La. Ann., 409). But it does not necessarily follow, because the checks were not endorsed by the persons whose names appeared on them as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amounts to the plaintiff.
>
> "A leading authority on the subject is *Bank of England* v. *Vagliano Bros.* (L. R., 1891, App. Cas., 107), which reversed *Vagliano Bros v. Bank of England* (23 Q. B. Div., 243, and 22 Id., 103). This authority has been freely cited and is directly in point.
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> • • •
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> "Some doubt was expressed in the *Bank of England* case as to whether the statute warranted such

construction, since the effect was to make the fictitiousness of the payee depend upon the maker's intention, but under our own statute no such question can be raised. The Negotiable Instruments Law provides (Laws of 1897, Chap. 612, Sec. 28): 'The instrument is payable to bearer. * * * 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.'

"The correctness of the decision in *First National Bank* v. *Northwestern Bank* (*supra*), may well be questioned, since the decision of the Lower Court—which was reversed by the House of Lords—in the Bank of England case was cited at length and relied upon. Whether this be so or not, the decisions in our own State are entirely in harmony with the views expressed by the House of Lords. * * *

"Under the Negotiable Instruments Law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the makers' signatures, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the *Bank of England* and *Phillips* cases, in order to accomplish the fraud more easily, the *names inserted as payees were those of persons to whom checks might naturally be made.* Whether endorsing the names of the payees upon the checks was technically forgery or not, it is unnecessary to consider; it has been convenient to thus describe them. Despite these forged endorsements, then, the defendant acquired good title, since, *in legal effect, the checks were payable to bearer.* Plaintiff having paid them to a holder in due course cannot recover upon the ground that the payees' signatures were forged. * * * I am of the opinion that any equities in the

present case are with the defendant. The risk of paying out money upon the forged signature of a depositor is one which a banker must assume, and if the plaintiff had detected the forgeries when the checks were presented for payment, it would not have suffered any loss, and it is possible that the defendant would not" (italics ours).

One of the leading cases on this subject, decided by the Court of Appeals of New York is

Phillips v. *Mercantile National Bank,* 140 N. Y., 556, in which the Court, per Gray, J., said (p. 562):

"The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name."

Snyder v. *Corn Exchange National Bank,* 221 Pa., 599, is to the same effect. The Supreme Court of Pennsylvania there held (p. 605):

"By our Negotiable Instruments Act * * * a check is payable to bearer 'when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.' * * * Niemann may have been an existing person, but he could have been, and was, a fictitious one within the meaning of the Act of Assembly if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. * * * A *fictitious person* within the contemplation of the Act of 1901 *is not merely a non-existing one, for, if so, the word 'non-existing' would have been sufficient without more.* It is clear, then, that when the Legislature declared that a check payable to a 'fictitious or non-existing person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it, therefore, matters not

whether the name of the payee used by him be that of one living or dead, or of one who never existed" (italics ours).

It is, of course, so obvious as to preclude debate, that when, in the case at bar, Howard, the forger, drew a check, payable to the order of Lieutenant Sumner, to which he forged the latter's signature, and endorsement, and on which he fraudulently procured and converted to his own use the proceeds, he did not intend that Lieutenant Sumner should ever have any title to, or interest in, or even possession of, the instrument.

Within the principle of the decisions cited, therefore, and from which we have quoted, Lieutenant Sumner must be deemed to have been a fictitious payee within the provisions of Section 9 of the Negotiable Instruments Law, which, as is set forth in the stipulation of facts was in effect in Vermont and New York at the time when the transactions in question took place, and which was also in effect, as this Court will judicially recognize, in the District of Columbia.

The Solicitor General in his brief urges that the check, in spite of the provisions of Section 9 of the Negotiable Instruments Law, cannot be considered as payable to bearer, because of the provisions of *R. S. Sec.* 3620, providing that it shall be the duty of disburing officers to draw "only in favor of the person to whom payment is made." He contends, therefore, that Lieut. Sumner was forbidden by this Statute to draw a check payable to bearer, and, upon the assumption that the Howard National Bank was chargeable with knowledge of this limitation upon his authority, that it could acquire no rights against the Government by cashing a check payable to bearer.

The short answer to this contention is, that so far as the Howard National Bank knew, and so far as the face of the check itself disclosed, the latter instrument was *not* payable to bearer, but was payable to and was in favor of a specific person to whom the Bank made payment through his known agent and pay-clerk.

The fact that by operation of law and because of a chain of circumstances, of which the Bank had no knowledge, the check is to be treated as if it were in terms payable to bearer, is, therefore, of not the slightest consequence so far as this Statute is concerned. To contend otherwise necessarily involves the assumption that the Bank is chargeable not only with knowledge of the statute but also of all of the facts, *including the secret fraudulent intent of the forger,* which, by operation of law transformed this check into an instrument payable to the order of a fictitious person. In the face of the conceded absence of any knowledge, or even suspicion on the part of the Bank of these circumstances (*Transcript of Record,* page 21, fol. 35), this contention is so artificial as to preclude the necessity of any further discussion.

As a matter of fact, the actual insertion of the words "or bearer" after the purported payee's name on the face of the check would have constituted no violation of Sec. 3620.

15 Opinions of Atty. Genl. p. 288.

The only authority cited by the plaintiff in its support upon this point is

United States v. *National Bank of Commerce,* 205 Fed., 433.

There are several grounds upon which this case may be properly disregarded as an authority on this point. In the first place, the remarks of the Court on this phase of the case were unnecessary to its decision. Secondly, the signature of the drawer was *genuine*, and was held to be that of the United States. Thirdly, the party asserting the bearer nature of the check was the drawee Bank, which "as a National Depositary" the Court held was chargeable with notice of the limitations of the disbursing officer's authority. Finally, the Court cites no authority in support of its dictum. On the other hand, in the instant case the point was squarely raised below, and the decision of the Circuit Court of Appeals for the Second Circuit that the check was payable to bearer necessarily decided this contention adversely to the United States.

POINT III.

The record fails to disclose any facts sufficient to justify a finding that the Howard National Bank was negligent.

Plaintiff's counsel contends that the defendant, or rather the Howard National Bank in whose shoes he claims the defendant stands, was negligent. We submit that the record utterly fails to show any negligence on the part of the Howard National Bank, but on the contrary does disclose gross negligence on the part of the *plaintiff*.

On what ground does the plaintiff contend that the Howard National Bank was negligent?

Certainly not because the Bank failed to discover that Lieutenant Sumner's signature was forged, since the latter was not one of the Bank's depositors and hence it had no means of making a comparison with his true signature.

There are only two specifications of negligence even suggested in our learned opponent's brief; first, that the Bank should have suspected Howard's authority to cash the check and, second, that it did not require Howard to endorse his own name on the check.

Why *should* the Howard National Bank have suspected Howard's authority to cash this check? It had frequently cashed checks drawn by Sumner as Acting Quartermaster upon the treasurer, which were presumably also payable to his own order since they bore his endorsement (Transcript of Record, page 16, fol. 31). It does not appear in the record whether such checks were cashed by Sumner personally or by Howard in his behalf, or sometimes by one and sometimes by the other. Under any circumstances, however, First Class Sergeant Howard had been acting in the capacity of finance clerk in Sumner's office since the summer of 1913, approximately a year and a half prior to this transaction, his duties being to handle all papers relating to finance that came into the office. He also acted as pay clerk to Lieutenant Sumner and in fact handled all monetary papers concerned in the transactions of the plaintiff's Quartermaster at that post. All of these

facts are stipulated (Transcript of Record, p. 21, fol. 35), as well as the additional fact *that the Howard National Bank knew Sergeant Howard as such clerk* (Id.)

It is further stipulated that not only did the Bank not know, but that it did not even *suspect* any irregularity with respect to the right of Howard to negotiate the check or to receive the proceeds of such negotiation (*id.*, fol. 35).

Under these circumstances how can it be claimed that the Bank was guilty of negligence? Howard was no *stranger* to it, but known to be a trusted employee of the plaintiff, and Sumner's right hand man, one of a few men specially trained for the position which he had occupied at that particular post for approximately eighteen months, and entrusted with the handling of all the monetary papers in that department.

Nor was there anything unusual in cashing such a check over the counter. It was in the precise form which undoubtedly was used for payroll purposes. It would be a perfectly natural thing for the Quartermaster to send his Pay Clerk, rather than to go in person to the Bank to cash the check, and carry back the funds necessary to meet a payroll.

Certainly this Court will not say that under all these circumstances the fact that the Bank cashed the check and gave the money to Howard instead of insisting that the Quartermaster officer appear in person to receive the funds, constituted negligence *as a matter of law,* or, in the absence of other facts, even sufficient evidence to justify such a finding of fact on the part of a jury.

There remains, then, but one other suggestion of negligence on the part of the Howard National Bank, namely: that it did not require Howard to endorse his own name on the back of the check.

The Solicitor General concedes that there is nothing in the Negotiable Instruments Law which required such an endorsement on the part of Howard, but insists that there is a custom of bankers so universal that this Court should take judicial notice of it, requiring a person re-

ceiving payment of a check or draft to endorse his name on it as a form of receipt and as a means of identification (Plaintiff's Brief, p. 8).

There is no such custom pleaded in the complaint nor is there a word in the record to support the existence of such a custom, either of this particular bank or among banks generally in the State of Vermont, or elsewhere. We emphatically dispute the existence of such a custom.

Exactly the same contention was made in the case of

Dedham National Bank v. *Everett National Bank,*
177 Mass. 392,

where a bank cashed a check drawn on another bank in bearer form, presented to it by the clerk of the ostensible drawer, without inquiring as to the genuineness of the signatures or requiring an endorsement. The check having been paid by the bank on which it was drawn in spite of the fact that the drawer's signature was forged, it was held that the drawee bank could not recover from the cashing bank under the circumstances above set forth. In that case counsel for the plaintiff did not presume to ask the court to take judicial notice of any such alleged custom as is contended for here, but sought to prove the existence of such a custom by the testimony of witnesses in accordance with the rules of evidence. The Trial Judge, after stating that the evidence as to the custom was conflicting, held as follows:

> "I am not satisfied that any such custom exists, the usage varying with different banks."
>
> Id., 177 Mass. at bottom of page 393.

Upon review of the case, Mr. Justice Holmes, then Chief Justice of the Supreme Court of Massachusetts, held as follows:

> "The plaintiff attempts to make out that the defendant led the plaintiff to make the payment by requiring no endorsement of the checks, on the ground that its officer was led by that fact to suppose that they were cashed for the man who appeared to have been their maker. The attempt to prove a custom

that would justify such an inference failed, and the judge may not have believed even that the officer was influenced in his conduct by the absence of an indorsement. *But if he was, the evidence did not show any duty on the part of the defendant to anticipate such a result*" (italics ours).

Id. 177 Mass. at page 396.

POINT IV.

Both parties having moved for the direction of a verdict, the exception to the finding of the trial judge in favor of the defendant does not permit the plaintiff to raise the question of the negligence of the Howard National Bank for review by this court upon writ of error.

In the last analysis the argument of the Solicitor General on the question of the alleged negligence of the Howard National Bank amounts to nothing more than a claim that this Court should *infer* such negligence from the mere fact that the bank did not inquire as to Howard's authority and did not require his endorsement. Such an inference, however, is one of fact, peculiarly within the province of a jury, or trial judge in the event of waiver of or other dispensation with a jury.

Wigmore on Evidence, Vol. IV., §2552 (c), p. 3593.

In the case at bar both sides moved for the direction of a verdict (transcript of record, p. 45, fol. 82), without any further request, and a general verdict was directed in favor of the *defendant* (id.). The only exception in the entire record is that taken by the plaintiff to such general verdict (id.).

Under these circumstances we submit that upon review by this court under writ of error the question of the alleged negligence of the Howard National Bank is no longer open.

In *Beuttell* v. *Magone*, 157 U. S., 154, this Court said (p. 157):

"As * * * both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the findings made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the findings on the law, and must affirm if there be any evidence in support thereof."

In *Williams* v. *Vreeland,* 250 U. S., 295, Mr. Justice McReynolds, delivering the opinion of this Court, said (p. 298):

"The established rule is, 'Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' *And upon review, a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it.*" (Italics ours.)

See also:

Sena v. *American Turquoise Co.,* 220 U. S., 497; *Bowen* v. *Chase,* 98 U. S., 254.

In passing upon the question as to whether there is any evidence to support the verdict or finding of the court below, this Court will not review such verdict or finding, if it involves mixed questions of law and fact.

In *Martinton* v. *Fairbanks,* 112 U. S., 670.

Mr. Justice Woods, delivering the opinion, said (p. 674):

"The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. * * * But the plaintiff-in-error has taken no such exception.

*By excepting to the general finding of the court, it is in the same position as if it had submitted its case to the jury, and, without any exception taken during the course of the trial, had, upon a return of the general verdict for the plaintiff, embodied in a bill of exceptions all the evidence, and then excepted to the verdict because the evidence did not support it. * * * The general finding is conclusive of the issues of fact against the plaintiff-in-error, and there is no question of law presented by the record of which the court can take cognizance."* (Italics ours.)

See also opinion of Mr. Justice Lurton in *Kentucky Life & Accident Co.* v. *Hamilton,* 63 Fed., 93.

In view of the circumstance that the record contains not only stipulations of ultimate facts, but also of evidentiary facts, and even of what is equivalent to oral testimony of evidentiary facts, as to the inferences from which there is no agreement or special finding, this Court will not weigh such evidence for the purpose of determining whether it might have been sufficient to support a verdict contrary to that actually rendered.

In *Wilson* v. *Merchants' Loan & Trust Co.,* 183 U. S., 121, the Court said (p. 128):

> "Here, although there is a general finding in favor of the defendant, yet there is a statement of facts which contains certain ultimate facts, together with certain other facts, evidential in their nature from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever. In such case it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute."

In *Lehnen* v. *Dickson,* 148 U. S., 71, the Court, discussing a general finding by the trial judge, said (p. 73):

> "We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury."

See also:

Otoe County v. *Baldwin,* 111 U. S., 1, 12;
Basset v. *United States,* 9 Wall., 38, 40;
Dooley v. *Pease,* 180 U. S., 126, 131.

Furthermore, the Court will conclusively presume not only that all facts have been found in favor of the prevailing party, which might have been so found, but also *that all facts sought to be established by inference or otherwise, by the losing party, have been found against him.*

In *Hepburn* v. *Dubois,* 12 Peters, 345, the Court discussing the rules as to the effect of a jury verdict, said (p. 376):

> "If this court can comprehend what these rules are, or promulgate them in intelligible language, they are these:
>
> "That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case. If, in its judgment, the Appellate Court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom; in the same manner and with the same legal results, as if they had been found and definitely set out in a special verdict. *So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence.*" (Italics ours.)

Under the rules laid down by the foregoing authorities it must be presumed, we submit, that the trial court found

against the plaintiff on the issue of alleged negligence on the part of the Howard National Bank. Such a finding is not open to review by this Court, under its decisions above cited.

POINT V.

Even assuming that the Howard National Bank was negligent in cashing the check, such negligence could not be charged to the Defendant Bank, which was a bona fide purchaser for value.

The check in suit was forwarded by the Howard National Bank to the defendant bank not only for collection, but also for deposit to the credit of the account of the former bank, and was so received and credited by the defendant bank, (Transcript of Record, p. 21, 22, fols. 36, 37).

Prior to the discovery of the forgery the defendant bank paid the Howard National Bank various sums of money in excess of the amount to the credit of said bank with the defendant bank at the time of the receipt and credit of the said check, including, in such credit, the amount of the said check (*id.*, p. 22, fol. 37).

No specific or special directions as to the application of this check or any subsequent deposit were given by the Howard National Bank and no special appropriation was made by the defendant bank. (*Id.*)

Under these circumstances, the authorities are clear that the defendant bank became a purchaser for value of the check, even though it always may have had on hand in this account, as a result of *subsequent* deposits, a sum in excess of the amount of the check.

Merchants National Bank v. *Santa Maria Sugar Co.*, 162 App. Div., 248;

National Park Bank v. *Seaboard Bank*, 114 N. Y. 28;

Rickerson Roller-Mill Co. v. *Farrell Foundry & Machine* Co. (C. C. A. 6th Circuit), 75 Fed., 554, (Opinion by Lurton, C. J.)

The Solicitor General argues (page 6, plaintiff's brief) that the defendant bank is in no better position than the Howard National Bank, using the following language:

> "But the law recognizes no such thing as a holder in due course of a negotiable instrument void in its inception because of the forgery of the drawer's signature. Therefore, the defendant merely stood in the shoes of the (Howard National) Bank."

No authorities, however, are cited in support of this statement.

On the other hand, we submit that the law is directly to the contrary, and that the following authorities support our contention:

National Park Bank v. *Ninth National Bank,* 46 N. Y., 77;

Trust Company of America v. *Hamilton Bank,* 127 N. Y. App. Div., 515;

Jones v. *Miners, etc., Bank,* 144 Mo. App., 428; 128 S. W., 829;

Pennington County Bank v. *Moorehead First State Bank,* 110 Minn., 263;

United States v. *Bank of New York,* 219 Fed., 648;

Raphael v. *Bank of England,* 17 C. B., 161.

The argument that, in the event that the plaintiff should succeed in this action, the defendant bank might have recourse against the Howard National Bank upon its endorsement of the check, is of no force. There is no reason in justice or authority why the defendant bank, if it is a *bona fide* holder for value of this check, should be put to the trouble, expense and risk of a law suit against the Howard National Bank, particularly where there is not the vestige of a claim that the *defendant* bank was guilty of any negligence or was in any respect at fault.

No reason is advanced either in the record or in the brief of the plaintiff why it did not *itself* proceed in the first instance against the Howard National Bank, if it considered, as it urges here, that the question of the alleged

negligence of that bank was in itself sufficient to justify a recovery on its part.

POINT VI.

The stipulated facts set forth in the record establish such negligence on the part of the plaintiff as will, irrespective of any other question in this case, preclude its right to recovery. The general verdict directed in favor of the defendant necessarily constituted a finding of such negligence which this court will not disturb upon writ of error.

The issue of negligence on the part of the plaintiff in failing to discover the forgery and notify the defendant thereof to the latter's prejudice, was squarely raised by the clear allegations contained in the defendant's amended answer (transcript of record, p. 10, fols. 18 and 19). We submit that the ultimate facts when taken together with the evidentiary facts admitted by the stipulations (*id.*, 43 to 45, fols. 79 to 81) necessitate the drawing of an inference of such negligence, which inference, because of the direction of a general verdict in favor of the defendant, will be presumed to have been drawn by the Trial Court, and hence will not be reviewed by this Court because of the reasons and authorities set forth at length under Point IV. of this brief and therefore not repeated here.

It is not necessary, however, that the defendant should shelter itself, although fully justified in so doing, behind the verdict of the Trial Court. On the contrary, we welcome the issue raised by the Solicitor General in Point IV of his brief, which asserts that the plaintiff is not barred from recovery by its negligence in failing sooner to discover and notify the bank of the forgery.

It is first asserted by him that the forgery was so well done that it could not be detected by a mere inspection of the drawer's handwriting (plaintiff's brief, p. 20). Our answer to this is that there is not a word on the subject

one way or the other in the record, and therefore we might urge with equal propriety that it was undisputed that a mere inspection of the purported drawer's genuine handwriting would have immediately disclosed the forgery.

His next argument is that the defendant was no worse off than it would have been had the plaintiff delayed paying the check for two weeks, "pending the investigation of the genuineness of the drawer's signature." The most obvious answer to this argument is that if the Treasury Department had failed to honor the check and had notified the defendant that it was conducting an investigation as to the genuineness of the signature, this would necessarily have constituted such warning to the Howard National Bank as would have resulted in immediate action on its part and, probably, as we shall hereafter point out, the apprehension of the forger and the recovery of the proceeds of the fraud.

It is not delay on the part of the United States in *determining* the question of genuineness of which the defendant complains. It is the fact that it did *not* delay in making such determination or exercise reasonable or any other precaution with respect thereto, but, on the contrary, after *actual examination of the signature* (transcript of record, p. 40, fol. 72) and in spite of every opportunity to compare the forged with the genuine signature of the ostensible drawer, it *immediately* determined that the signature was genuine and honored the draft.

In this connection it must not be forgotten that the payment of this check by the United States resulted in an *overdraft* of Lieutenant Sumner's account with it (*id.*, p. 23, fols. 38-39).

This last fact effectually disposes of any argument or inference that the forgery was so well executed that it could not have been reasonably discovered upon examination or comparison. It was the duty of the Treasury representative, *entirely irrespective of the question of forgery*, to have dishonored this draft.

It is apparent, however, that not the slightest diligence

or care of any kind was exercised by the plaintiff, upon the presentation of this check, either in protection of its own interests or in fulfillment of its duty to the presenting holder.

Nor did the subsequent conduct of the plaintiff manifest any greater degree of diligence or care on its part.

Although as above stated, the payment of the check constituted an overdraft in the account of Lieutenant Sumner with the Treasury, the officials of that Department allowed *six days* to elapse before they even *wrote* to Sumner that his account was overdrawn and inquired as to the reason therefor (*id.*, p. 23, fol. 39).

Even then, notwithstanding the obvious fact that, as Disbursing Quartermaster, Lieutenant Sumner was directly responsible to the Treasury Department for the disposition by him of Government funds, the plaintiff supinely accepted for a further period of five days a reply on the part of Lieutenant Sumner to the effect that *he would explain the matter upon the return of his clerk, Howard, who was on furlough* (id. p. 23, fol. 39). Finally, on December 29, *twelve* days after the plaintiff had *received* this forged check, and eleven days after it had *paid* it, its suspicions at last overcame its lethargy to the point of telegraphing Lieutenant Sumner requesting him to "expedite the matter" (id., p. 23, fol. 39). Upon receipt of this telegram, Sumner, for the first time, made an investigation of his papers and accounts, something which he apparently could have done at any time and irrespective of the absence of his clerk, the forger. Result: the forgery was finally discovered. Even then, he did not notify the Howard National Bank of the forgery until two days later, namely, December 31, 1914 (id., p. 23, fol. 39).

That any bank or banking house which conducted its affairs in such a grossly careless and inefficient manner would soon face serious financial loss, if not worse, is apparent to anyone familiar with the vigilant and prompt methods necessarily adopted by such institutions for their

own protection in dealing with overdrafts and irregularities generally.

The Solicitor General apologizes for this extraordinary delay by stating to the Court that the Treasurer of the United States keeps accounts with six thousand disbursing agents and insists that the vast amount of bookkeeping thereby entailed, excuses the conduct of the plaintiff. (Plaintiff's brief, p. 21.)

Inasmuch as he has departed from the record in making this statement, it may not be amiss for us to call to the attention of the court the fact that the next report to the Comptroller of the Currency of the Chase National Bank, the defendant in this suit, will disclose that on December 31, 1919, the latter had 5,753 different depositors. On the same date the Guaranty Trust Co. of New York had 23,286 depositors, and one other State banking institution alone, namely, the Corn Exchange Bank ,had, on December 27th, 1919, not less than *96,701* depositors!

We have no doubt that other leading banks and banking institutions, not only in New York, but even in less populated cities of the United States, have an equal if not a greater number of depositors. There can be no question but that the huge mass of checks drawn every day by various depositors of any one of these institutions necessarily greatly exceeds the comparatively few drafts drawn daily upon the Treasury Department by its Disbursing Officers. Yet, no one of these institutions would be heard in any court to urge its resultant bookkeeping difficulties in exoneration of its negligence, whether in failing to discover a forgery of one of its depositor's signatures or to detect an overdraft, or in omitting to give immediate notice to all concerned of either these or any other irregularities.

That the plaintiff's negligence resulted in prejudice to the defendant is obvious from the facts relating to the forger's (Howard's) movements after cashing the check, which we have more fully set forth in the statement of

facts. Howard did not leave Burlington until the night of December 17, 1914 (transcript of record, p. 44, fol. 79). The forged check having been forwarded to the plaintiff on December 16th and therefore received in the ordinary course on the morning of the 17th, had proper precautions been taken by it and notice of the forgery telegraphed on that day to either Lieutenant Sumner, the Howard National Bank or even the defendant, the forger could have been easily apprehended while still in Burlington and undoubtedly with the proceeds of the fraud still in his possession. Even after his departure, Howard's movements were of the most open nature. The known character and description of his luggage, the presence of his female companion, his hotel registration under his own name, his marriage in Portland, Maine, his visit to his family, all would have rendered his apprehension immediately after notification of the forgery, a comparatively simple matter. Even after plaintiff's unpardonable delay had permitted his escape to Canada, he was easily apprehended there by the detectives of the American Bankers' Association on January 6, 1915, *within four days from the date the defendant first received notice of the forgery.*

Even at the time of his arrest, over three weeks after he had cashed the forged check, he still had in his possession a substantial residuum of the proceeds of this fraud, which was turned over to the plaintiff (id., p. 44, fol. 81).

We are not required, however, to speculate as to whether or not the plaintiff's negligence *actually* prejudiced the defendant, since it is well settled that the law will presume such to have been the fact.

> "As the right to seek and compel restoration and payment from the person committing the forgeries is, in itself, a valuable one, it is sufficient, if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and it may be effectively, exercising it."
>
> *Leather Manufacturers Bank* v. *Morgan*, 117 U. S., 96, at p. 115;

See also

Marks v. *Anchor Savings Bank,* 252 Pa., 304, at p. 310;

Gloucester Bank v. *Salem Bank,* 17 Mass., 32.

In the case last cited, Parker, C. J., used the following language (p. 45);

> "It has been said in argument that notice was given to the Salem Bank as soon as the notes were found to be counterfeit, and that an intimation was given as early as the 26th of February that they were questionable. But it was then too late. * * * The defendants then had no means of looking up those from whom they had received the notes, and, although there is no evidence in the case from which it can be ascertained that they could have saved themselves if they had received earlier notice, *the law itself will presume that a change of circumstances had taken place which would justify them in resisting the action*" (italics our).

That the United States enjoys no special privilege in respect to the duties imposed by law upon other holders of or parties to negotiable instruments is well illustrated by the language of the Court in *United States* v. *The Central National Bank,* 6 Fed. 134, where the point involved was as to whether the Treasury Department had given a sufficiently prompt notice of the forgery of the endorsement of a check drawn upon it. The Court held as follows (p. 135):

> "No good reason can be assigned for relieving the Government when dealing with commercial paper, from observance of the rules respecting vigilance which are enforced against individuals. That this view is entertained by the Supreme Court is plainly indicated by the case of *Cooke* v. *U. S.* (91 U. S. 397)."

In *Salas* v. *United States,* 234 Fed., 842, Judge Ward, delivering the opinion of the Circuit Court of Appeals of the Second Circuit said (p. 844):

> "When the United States enters into commercial business, it abandons its sovereign capacity and is to be treated like any other corporation. (*Bank of United States* v. *Planters Bank*, 9 Wheat., 904.)"

The following language by the same Court in the earlier case of *United States* v. *Bank of New York*, 219 Fed., 648, at p. 649, is also pertinent:

> "The number of persons who can have a right to draw bills upon the Government is relatively small, and it should protect itself as do banks and other large corporations against imposition in such cases."

POINT VII.

The authorities upon which plaintiff mainly relies are clearly distinguishable and inapplicable.

Danvers Bank v. *Salem Bank*, 151 Mass. 280 (discussed on page 9 of plaintiff's brief) deserves notice chiefly for for what plaintiff's counsel has omitted to mention. The *important and controlling fact* in that case, upon which the decision of the Court was expressly based, was that the defendant Bank cashed the check involved for *a total stranger, without even requesting identification.* Such omission, it has been held in other cases, constitutes such a failure to take ordinary and necessary precautions, as to impel the Court to throw the loss on the holder, on the ground, among others, that his negligence in failing to retain a clew by which the forger may be followed has contributed to the success of the fraud. Such doctrine, of course, has never been applied where the person presenting the instrument is well known to the cashing Bank, as in the case at bar.

It further appeared in that case, and the trial Judge found, that the endorsement was so apparently in the same handwriting as the name of the payee in the body of the check as to call attention to that circumstance upon inspection.

National Bank v. *Bangs,* 106 Mass. 441 (cited on page 10 of plaintiff's brief) adds a further explanation to the last mentioned case which was based largely upon it. In *National Bank* v. *Bangs,* the drawer's name was forged, it is true, but the *instrument was payable to the defendants who took it from a total stranger without inquiry.* Hence, the Court held and said (p. 445);

> "In the present case the *check* had not gone into circulation and *could not get into circulation until it was endorsed by the defendants* * * * *To the defendants the presentation by a stranger or third party, of a check purporting to be drawn to their own order,* which such third party proposed to negotiate to them for value, *was a transaction which should have aroused their suspicions.* It ought to have put them upon inquiry for explanations; and if *inquiry* had been properly made it *would have disclosed the fraud and prevented its success.*" (Italics ours.)

The other cases cited by plaintiff's counsel on pages 9 and 10 of his brief, as well as on page 11 and 12 thereof, are distinguishable for similar reasons.

The proposition stated by plaintiff at the beginning of the second paragraph on page 16 of its brief, relative to the common law, is wholly inapplicable because, as has been fully shown above, Section 9 of the Uniform Negotiable Instruments Law, providing that an instrument is payable to bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable," was in full force at the time of the transactions here involved in Vermont, New York, and the District of Columbia. Moreover, the authorities cited by plaintiff's counsel in support of such proposition are not helpful to him.

The first case as cited by him, and the one upon which presumably he principally relies, to wit, *National Bank* v. *Northwestern Bank,* 152 Ill. 296, was based on the decision of the English Court of Appeals in the *Vagliano* case, which was later reversed by the House of Lords, and

has been clearly overruled in principle by the later decision of the same State Court in the case of *Bartlett* v. *First National Bank*, 247 Ill. 490.

The following three cases, viz.,

Seaboard National Bank v. *Bank of America*, 193 N. Y. 26;

Boles v. *Harding*, 201 Mass. 103;

Jordan-Marsh Company v. *National Shawmut Bank*, 201 Mass. 397,

(cited by plaintiff on pages 16 and 17 of its brief) are in no sense authorities in support of plaintiff's contentions. In two of these cases a trusted employee, and in the third, an impostor, fraudulently induced the drawers to sign checks payable to the order of persons designated by the respective wrongdoers, who then forged endorsements of such ostensible payees and cashed the instruments. The person signing such check in each instance, however, namely the drawer, that is, "the person making it so payable," acted in perfectly good faith and really intended that the payee named should actually have the paper and the proceeds thereof.

United States v. *National Bank of Commerce*, 205 Fed. 433; 224 Fed. 679, has heretofore been distinguished in this brief on one point. It may, however, be further distinguished. The checks there involved were cashed for a stranger without requiring his identification. That constituted such negligence in the cashing Bank as in itself justified the result reached by the Court and was manifestly the real ground of its decision (205 Fed. 438).

The cases cited by plaintiff's counsel on pages 22, 23 and 24 of his brief, in so far as they have not heretofore been distinguished, merely support the proposition that, at common law, a depositor in a Bank was under no obligation to make a prompt examination of returned vouchers for the purpose of discovering forgeries. This proposition has no bearing on the case at bar.

POINT VIII.
The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HENRY ROOT STERN,
Counsel for the Defendant-in-Error.

RUSHMORE, BISBEE & STERN,
Attorneys for Defendant-in-Error.

UNITED STATES *v.* CHASE NATIONAL BANK.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 134. Argued January 14, 15, 1920.—Decided April 19, 1920.

A drawee who pays a draft drawn to the drawer's order, upon which the drawer's signature, as well as his endorsement, is forged, cannot recover the money from a *bona fide* holder for value, guilty of no bad faith or negligence contributing to the success of the forgery. P. 493.

In order to recover money as paid under mistake of fact, the plaintiff must show that the defendant cannot in good conscience retain it. *Id.*

250 Fed. Rep. 105, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Spellacy, with whom *Mr. Leonard B. Zeisler* and *Mr. Charles H. Weston* were on the briefs, for the United States:

The plaintiff may recover, since the defendant did not change its position to its prejudice in reliance on the fact of payment and since its indorser was guilty of acts of negligence contributing to the success of the forgery. The law recognizes no such thing as a holder in due course of a negotiable instrument void in its inception because of the forgery of the drawer's signature. If plaintiff is permitted to assert as against the Howard National Bank that the drawer's signature was forged, it may also do so against the defendant. As between plaintiff and the Howard National Bank this case is not within the rule that one who has paid a check drawn upon him cannot deny the genuineness of the drawer's signature, but within the exceptions to it.

The Howard National Bank must have known that for almost two months prior to the presentation of this check Sumner had not been acting as quartermaster. This circumstance alone should have aroused its suspicion as to the authority of Howard to cash the check. It is true that Howard's endorsement on the check was not necessary for negotiation; but the universal custom of bankers, of which this court will take judicial notice, requires a person receiving payment of a check or draft to endorse his name on it as a form of receipt and as a means of identification. Morse, Banks and Banking, 5th ed., § 391. This is especially true where the check is being cashed by a bank on whom it is not drawn.

The check when presented to the Treasurer showed no endorsements intervening between that of Sumner and the bank, and the Treasurer was justified in believing that the money had been paid to Sumner in person. The bank's guaranty of Sumner's endorsement amounted to a representation that it knew it to be genuine. Since his signatures as drawer and endorser were indistinguishable, such a guaranty could not but allay any suspicion plaintiff might have as to the genuineness of his signature as drawer. It certainly amounted to a statement that the bank did not intend to call on the Treasurer to verify the signature. Had plaintiff been doubtful of the signature it might well rely upon that guaranty as evidence that the drawer's signature was genuine. Further, had Howard's endorsement appeared on the check, the plaintiff would have had notice that the money had not been paid to Sumner directly and the case might have called upon it to scrutinize the drawer's signature with more care. This is sufficient to defeat defendant's claim. *Danvers Bank* v. *Salem Bank*, 151 Massachusetts, 280, 283; *Ford & Co.* v. *Bank*, 74 S. Car. 180; *People's Bank* v. *Franklin Bank*, 88 Tennessee, 299; *Greenwald* v. *Ford*, 21 S. Dak. 28; *McCall* v. *Corning*, 3 La. Ann. 409; *Farmers' National Bank* v.

Farmers' & Traders' Bank, 159 Kentucky, 141; *Canadian Bank of Commerce* v. *Bingham*, 30 Washington, 484; *National Bank* v. *Bangs*, 106 Massachusetts, 441; *Williamsburgh Trust Co.* v. *Tum Suden*, 120 App. Div. 518; *Ronvant* v. *San Antonio National Bank*, 63 Texas, 610.

The general rule that money paid under a mistake of fact may be recovered, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, has been modified in the class of cases under consideration only to the extent that where the mistake is that of a drawee in failing to discover the forgery of his drawer's signature, he cannot recover where the person receiving the money has been free from negligence, or affirmative action, contributing to the success of the deception. The drawee is bound to know the signature of one who draws upon him, and his failure to detect a forgery is negligence as a matter of law. The rule applies only where the holder is himself entirely free from fault and slight circumstances have been laid hold of to show negligence on his part so as to take the case out of the operation of the exceptional rule. See cases cited *supra*, and *Ellis* v. *Trust Company*, 4 Oh. St. 628; *First National Bank* v. *State Bank*, 22 Nebraska, 769; *Woods* v. *Colony Bank*, 114 Georgia, 683; *Newberry Bank* v. *Bank of Columbia*, 91 S. Car. 294.

The doctrine that a check payable to a fictitious person is payable to bearer is inapplicable. The plaintiff is not barred from recovery in this case by negligence in failing sooner to discover and notify the bank of the forgery. Even if it was negligent in this respect, that would not avail the defendant, for the latter was itself negligent in cashing the draft under suspicious circumstances without inquiring into the right to receive the

money. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, distinguished.

All the authorities which lay down the rule that it is the duty of a depositor to exercise reasonable diligence to discover forgeries of his checks and that if the bank suffers a loss because of his negligence in failing to promptly discover and notify the bank of forgeries, the depositor cannot recover money paid out, recognize that where the bank has itself been guilty of negligence in paying a forged check it cannot receive a credit for the amount. *New York Produce Exchange Bank* v. *Housion*, 169 Fed. Rep. 785, 788; *Merchants National Bank* v. *Nichols & Co.*, 223 Illinois, 41, 52; *National Dredging Co.* v. *Farmers Bank*, 6 Penn. (Del.), 580, 590; *Brixen* v. *National Bank*, 5 Utah, 504; *United States* v. *National Bank of Commerce*, 205 Fed. Rep. 433, 436; *Danvers Bank* v. *Salem Bank*, 151 Massachusetts, 280.

Mr. Henry Root Stern for defendant in error:

The drawee of a check or draft is bound, at his peril, to know the drawer's signature and cannot, after payment to an innocent holder for value, recover back the amount from the latter. *Price* v. *Neal*, 3 Burr. 1354; *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333; *United States* v. *Bank of New York*, 219 Fed. Rep. 648; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *Bank of St. Albans* v. *Farmers' & Mechanics' Bank*, 10 Vermont, 141; *First National Bank of Belmont* v. *First National Bank of Barnesville*, 58 Ohio St. 207; *State National Bank* v. *Bank of Magdalena*, 21 N. Mex. 653; *Bergstrom* v. *Ritz-Carlton Restaurant & Hotel Co.*, 171 App. Div. 776; *Germania Bank* v. *Boutell*, 60 Minnesota, 189; Ames, 4 Harvard Law Review, 275.

This is equally true, even though the endorsement of the purported payee also is forged. *Postal Telegraph-Cable Co.* v. *Citizens' National Bank*, 228 Fed. Rep. 601;

State Bank v. *Cumberland Savings Bank*, 168 N. Car. 605; *Deposit Bank of Georgetown* v. *Fayette National Bank*, 90 Kentucky, 10; *First National Bank* v. *Marshalltown State Bank*, 107 Iowa, 327; *Howard & Preston* v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann. 727; *Bank of England* v. *Vagliano Bros.*, L. R. (1891) A. C. 107; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *National Bank of Commerce* v. *United States*, 224 Fed. Rep. 679; *s. c.*, 205 Fed. Rep. 433; 2 Parsons on Notes and Bills, 591; *Robinson* v. *Yarrow*, 7 Taunt. 455; *Cooper* v. *Meyer*, 10 B. & C. 468; *Beeman* v. *Duck*, 11 M. & W. 251; *Williams* v. *Drexel*, 14 Maryland, 566.

Inasmuch as the individual drawing this instrument did not intend that the person named as payee therein should have any interest in it or even possession, such payee was, within the negotiable instruments law, a "fictitious" payee, and hence the instrument was payable to bearer, and the endorsement surplusage.

The record fails to disclose any facts sufficient to justify a finding that the Howard National Bank was negligent. *Dedham National Bank* v. *Everett National Bank*, 177 Massachusetts, 392.

Both parties having moved for the direction of a verdict, the exception to the finding of the trial judge in favor of the defendant does not permit the plaintiff to raise the question of the negligence of the Howard National Bank for review by this court upon writ of error.

Even assuming that the Howard National Bank was negligent in cashing the check, such negligence could not be charged to the defendant bank, which was a *bona fide* purchaser for value. *Merchants National Bank* v. *Santa Maria Sugar Co.*, 162 App. Div. 248; *National Park Bank* v. *Seaboard Bank*, 114 N. Y. 28; *Rickerson Roller-Mill Co.* v. *Farrell Foundry & Machine Co.*, 75 Fed. Rep. 554; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *Jones* v. *Miners, etc., Bank*, 144 Mo. App. 428;

Pennington County Bank v. *Moorehead First State Bank*, 110 Minnesota, 263; *Raphael* v. *Bank of England*, 17 C. B. 161; *United States* v. *Bank of New York*, 219 Fed. Rep. 648.

The stipulated facts establish such negligence on the part of the plaintiff as will, irrespective of any other question in the case, preclude its right to recovery. The general verdict directed in favor of the defendant necessarily constituted a finding of such negligence which this court will not disturb upon writ of error. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 115; *Marks* v. *Anchor Savings Bank*, 252 Pa. St. 304, 310; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 32; *United States* v. *Central National Bank*, 6 Fed. Rep. 134; *Salas* v. *United States*, 234 Fed. Rep. 842; *United States* v. *Bank of New York*, 219 Fed. Rep. 648, 649.

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiff in error sued the defendant bank, at law, to recover money paid out under mistake of fact. The complaint alleged:

"First. That at all the times hereinafter mentioned, the plaintiff was and is a corporation sovereign, and the defendant was and is an association organized for and transacting the business of banking in the city, State, and Southern District of New York, under and pursuant to the provisions of the acts of Congress in such case made and provided;

"Second. That on or about the 18th day of December, 1914, the defendant presented to the Treasurer of the United States at Washington, D. C., for payment, a draft in the sum of $3,571.47, drawn on the Treasurer of the United States, payable to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., and purporting to be drawn by E. V. Sumner, Acting Quartermaster, U. S. A., and to be endorsed by E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., the

Howard National Bank, and the defendant; a copy of said draft and the indorsements on the back thereof is hereto attached and marked Exhibit A,[1] and made a part hereof;

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[1] (Ex. A.) [Face.]

OFFICE OF THE QUARTERMASTER.
Fort Ethan Allen, Vermont.

War Department, December
Quartermaster 15, 1914.
Thesaur Amer 444
(Shield) Treasurer of the United States 15-51
Septent Sigil.

Pay to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M. . . . $3571.47
Thirty-five hundred seventy-one & 47/100 dollars.
Object for which drawn: Vo. No. Cash transfers.

E. V. Sumner,
Acting Quartermaster, U. S. A. 21739.

[Back.]

Form Approved by the
Comptroller of the
Treasury
January 27, 1913.

This check must be indorsed on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

E. V. Sumner,
(Sign on this line)
2d Lt., 2d Cav., AQM.

Pay Chase National Bank
New York, or Order,
Restrictive endorsements guaranteed.
Howard Nat'l Bank,
58-3 Burlington, Vt. 58-3,
M. T. Rutter, Cashier.

Received payment from
The Treasurer of the United States
Dec. 16, 1914.
1-74 The Chase National Bank 1-74
Of the City of New York.

"Third. That at the date of the presentation of said draft by the defendant to the Treasurer of the United States, the defendant was a depository of the funds of the United States of America, and payment of said draft to the defendant was thereupon made by the plaintiff, by passing a credit for the amount of said draft to the defendant upon the accounts of the defendant, as depository for the funds of the plaintiff;

"Fourth. That the name of said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., endorsed upon the back of said draft, was forged and had been wrongfully and fraudulently written upon the same by a person other than the said E. V. Sumner, without his knowledge or consent, and no part of the proceeds of said draft were ever received by him;

"Fifth. That the payment of said draft made by the plaintiff to the defendant, as described in paragraph three of this complaint, was made under a mistake of fact and without knowledge that the signature of the said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., payee thereof, had been forged upon the back of said draft;

"Sixth. That the plaintiff has duly requested the defendant to repay to it the amount of said draft, to wit, $3,571.47, but the defendant has failed and refused to pay the same or any part thereof to the plaintiff.

"Wherefore, the plaintiff demands judgment against the defendant in the sum of $3,571.47, with interest thereon from the 18th day of December, 1914, together with the costs and disbursements of this action."

The bank denied liability and among other things claimed that the same person wrote the name E. V. Sumner upon the draft both as drawer and indorser. The facts were stipulated.

It appears: Lieutenant Sumner, Quartermaster and Disbursing Officer at Fort Ethan Allen, near Burlington, Vermont, had authority to draw on the United States Treasurer. Sergeant Howard was his finance clerk and so

known at the Howard National Bank of Burlington. Utilizing the official blank form, Howard manufactured *in toto* the draft in question—Exhibit A. Having forged Lieutenant Sumner's name both as drawer and indorser he cashed the instrument over the counter at the Howard National Bank without adding his own name. That bank immediately indorsed and forwarded it for collection and credit to the defendant at New York City; the latter promptly presented it to the drawee (The Treasurer), received payment and credited the proceeds as directed. Two weeks thereafter the Treasurer discovered the forgery and at once demanded repayment which was refused. Before discovery of the forgery the Howard National Bank withdrew from the Chase National Bank sums aggregating more than its total balance immediately after such proceeds were credited; but additional subsequent credit items had maintained its balance continuously above the amount of the draft.

Both sides asked for an instructed verdict without more. The trial court directed one for the defendant (241 Fed. Rep. 535) and judgment thereon was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 105. If important, the record discloses substantial evidence to support the finding necessarily involved that no actual negligence or bad faith, attributable to defendant, contributed to success of the forgery. *Williams* v. *Vreeland*, 250 U. S. 295, 298.

The complaint placed the demand for recovery solely upon the forged indorsement—neither negligence nor bad faith is set up. If the draft had been a valid instrument with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake. *Hortsman* v. *Henshaw*, 11 How. 177, 183. But here the whole instrument was forged, never valid, and nobody had better right to it than the collecting bank.

Price v. *Neal* (1762), 3 Burrow's, 1354, 1357, held that it is incumbent on the drawee to know the drawer's hand and that if the former pay a draft upon the latter's forged name to an innocent holder not chargeable with fault there can be no recovery. "The plaintiff can not recover the money, unless it be against conscience in the defendant to retain it." "But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery." And the doctrine so announced has been approved and adopted by this court. *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333, 348. *Hoffman & Co.* v. *Bank of Milwaukee*, 12 Wall. 181, 192. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 109. *United States* v. *National Exchange Bank*, 214 U. S. 302, 311.

In *Bank of United States* v. *Bank of Georgia*, through Mr. Justice Story, this court said concerning *Price* v. *Neal:*

"There were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder, to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed, that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, 'Here was no fraud, no wrong; it was incumbent upon the plaintiff to be satisfied, that the bill drawn upon him was the drawer's hand, before he accepted or paid it; but [it] was not incumbent upon the defendant

to inquire into it. There was a notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up; the other bill he actually accepts, after which, the defendant, innocently and *bona fide*, discounts it; the plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them, at the time of paying them; whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man, upon another innocent man. But, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.' The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it, before the time it was [illegible] or acknowledged. So that there is no pretence to allege, that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Price* v. *Neal* has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."

Does the mere fact that the name of Lieutenant Sumner was forged as indorser as well as drawer prevent application here of the established rule? We think not. In order to recover plaintiff must show that the defendant cannot retain the money with good conscience. Both are

innocent of intentional fault. The drawee failed to detect the forged signature of the drawer. The forged indorsement puts him in no worse position than he would occupy if that were genuine. He cannot be called upon to pay again and the collecting bank has not received the proceeds of an instrument to which another held a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank who had full right to act upon the assumption that the former knew the drawer's signature or at least took the risk of a mistake concerning it. *Bank of England* v. *Vagliano Bros.*, L. R. App. Cas. [1891] 107; *Dedham Bank* v. *Everett Bank*, 177 Massachusetts, 392, 395; *Deposit Bank* v. *Fayette Bank*, 90 Kentucky, 10; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77, 80; *Howard* v. *Mississippi Valley Bank*, 28 La. Ann. 727; *First National Bank* v. *Marshalltown State Bank*, 107 Iowa, 327; *State Bank* v. *Cumberland Savings & Trust Co.*, 168 N. Car. 606; 4 Harvard Law Review, 297, Article by Prof. Ames. And see, *Cooke* v. *United States*, 91 U. S. 389, 396.

The judgment of the court below is

Affirmed.

MR. JUSTICE CLARKE dissents.